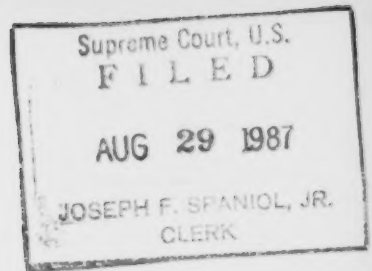


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IN THE SUPREME COURT OF THE UNITED STATES
October Term

CHARLES D. STEVER,

Petitioner,

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

CONTANT, CONTANT, SCHUBER,
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Of Counsel

ANDREW T. FEDE, ESQ.
On the Brief

9528



QUESTION PRESENTED

Whether the post-arrest custodial questioning of the defendant, following the question asking whether the defendant will submit to a breathalyzer test, constitutes interrogation.

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1987

TO THE HONORABLE, CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

CHARLES D. STEVER, the Petitioner herein
prays that a Writ of Certiorari issue to
review the Judgment of the Supreme Court
of New Jersey entered in the above
entitled case on June 30, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of
New Jersey is reported at 107 N.J. 543
and is printed in Appendix A, hereto,
infra, page 1. The opinion of the
Appellate Division of the Superior Court
of New Jersey is unreported and is
printed in Appendix A, page 26. The
opinion of the Law Division of the
Superior Court of New Jersey is
unreported and is printed in the
Appendix A, page 29.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 30, 1987. The jurisdiction of the Supreme Court to review said judgment by Writ of Certiorari is provided by 28 U.S.C.S. Sec. 2104 (1977).

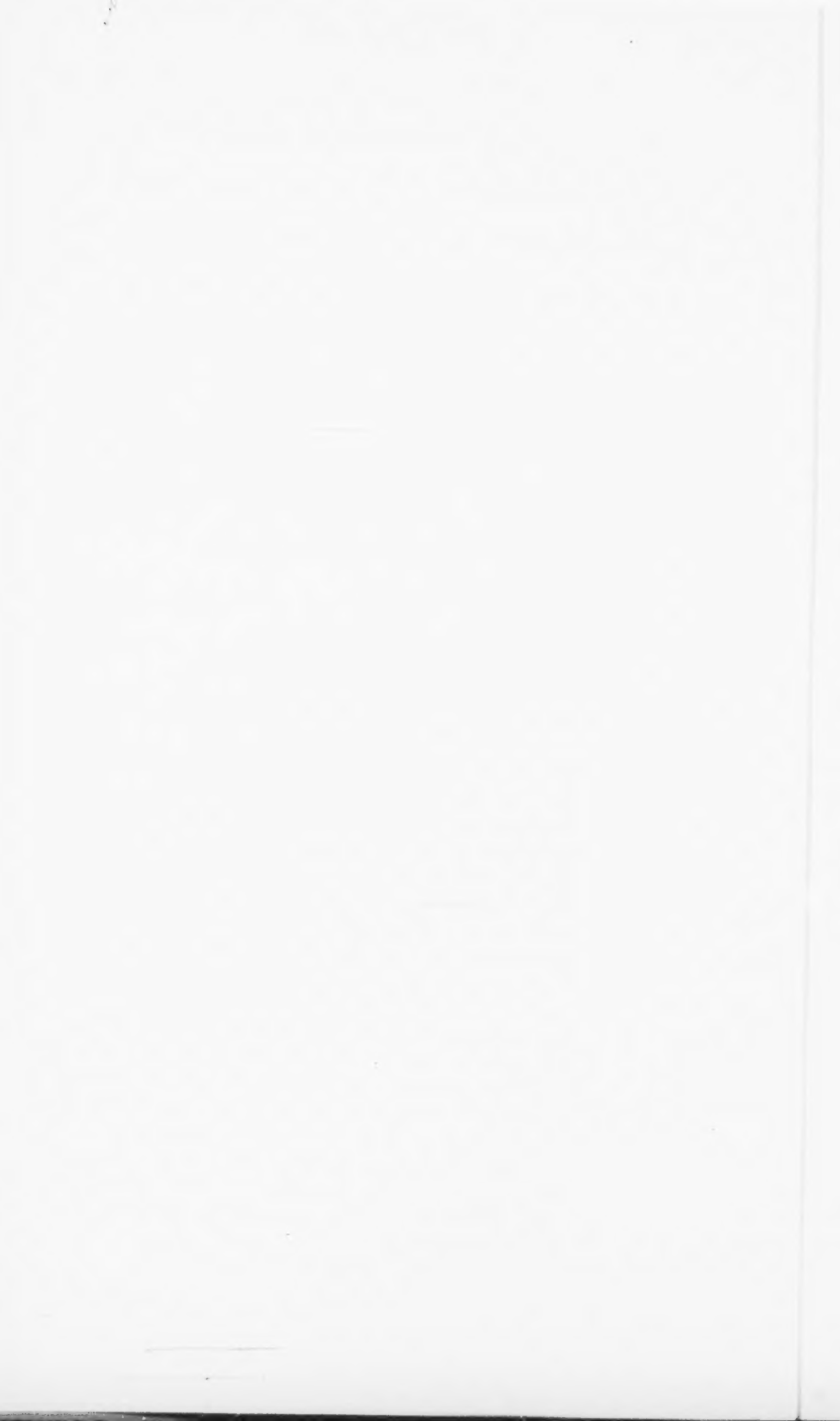
QUESTION PRESENTED

Whether the post-arrest custodial questioning of the defendant, following the question asking whether the defendant will submit to a breathalyzer test, constitutes interrogation.

CONSTITUTIONAL PROVISION INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

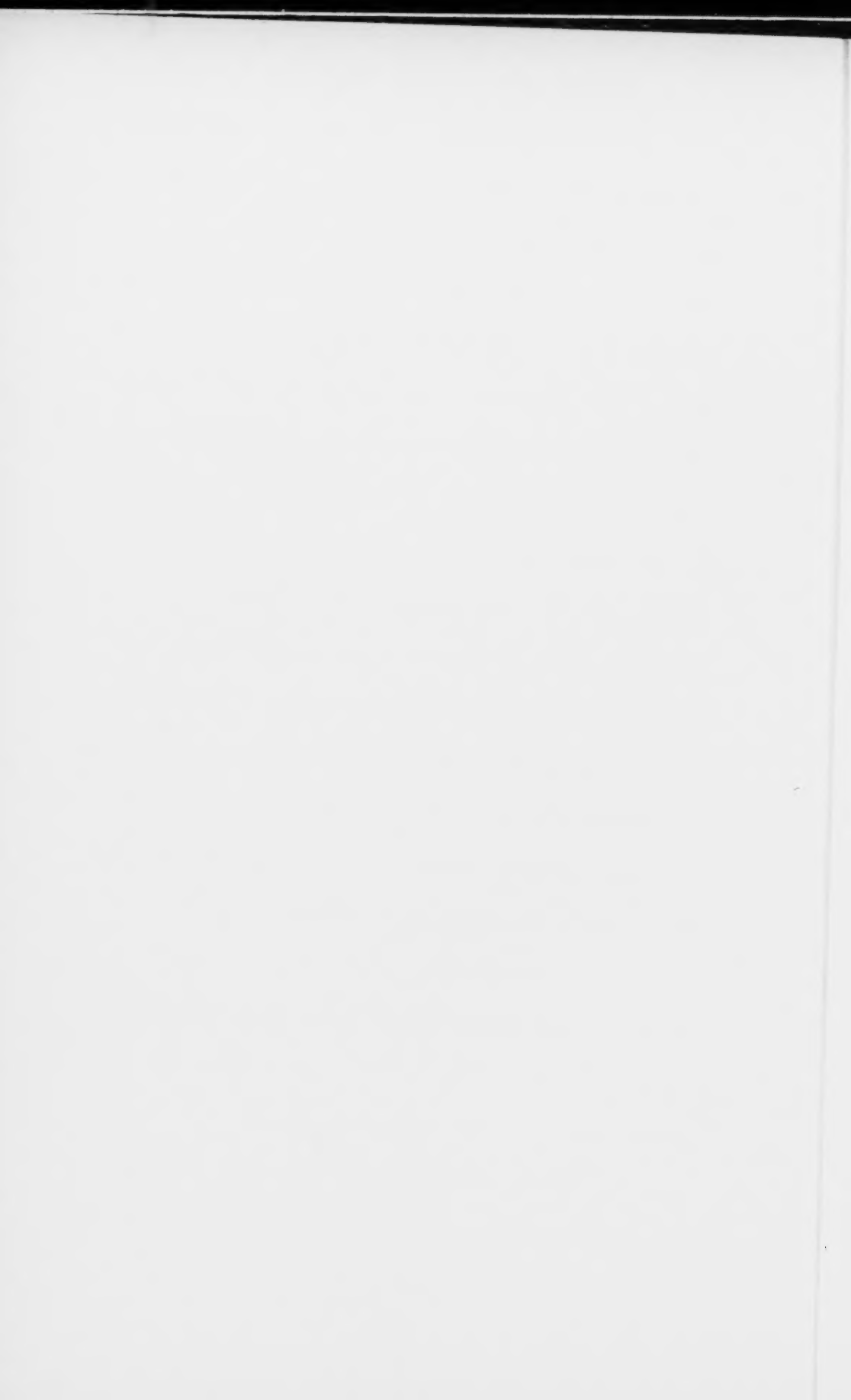
U.S. Const. amend. V.



STATEMENT OF THE CASE

The defendant, CHARLES D. STEVER, (hereinafter "Defendant"), was found guilty in the Municipal Court of Woodcliff Lake, New Jersey of consuming an alcoholic beverage while operating a motor vehicle in violation of N.J.S.A. 39:4-51(a) and refusing to submit to a breathalyzer test in violation of N.J.S.A. 39:4-50.2. These offenses were not appealed by the Defendant. The Defendant did appeal, however, his conviction for driving while intoxicated in violation of N.J.S.A. 39:4-50 because he contends that evidence was admitted in the Courts below in violation of the Defendant's constitutional rights.

The Defendant was first tried before the Woodcliff Lake Municipal Court on May 29, 1984. The Magistrate admitted on the driving while intoxicated charge two bits of evidence, the Defendant contends, in violation of



his rights. The first is an alleged admission by the Defendant elicited during custodial interrogation conducted in connection with the attempt of the two police officers involved to require the Defendant to submit to a breathalyzer test. The police officers described the Defendant's statement in a number of increasingly incriminating ways. In substance, they asserted that the Defendant, when asked why he would not consent to the test, stated he feared he would incriminate himself. It is undisputed that at the time of the Defendant's arrest, he was not read his "Miranda rights", nor was he read his rights at the stationhouse.

Nevertheless, this alleged admission was part of the record in this case and the Superior Court Judge also referred to the alleged admission in his written decision affirming the conviction. This



was despite the fact that in July of 1984, the United States Supreme Court decided the case Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), and that the defense argued that this decision barred admission into evidence of the Defendant's alleged incriminating statement.

The other objectionable evidence admitted by the Magistrate was the Defendant's statements constituting his refusal to take the breath test. Again, this evidence was recited by the Magistrate and the Superior Court Judge in their decisions. The Defendant's refusal to take the breathalyzer was admitted into evidence on the driving while intoxicated charge despite the fact that he was given no warning that his refusal would be so admitted.

After the May 29, 1984 hearing, the Defendant sought and obtained a remand



to the Municipal Court to allow the Defendant to produce the testimony of witnesses to rebut the surprise testimony of the arresting officer elicited on the State's rebuttal. The Court again found the Defendant guilty. The matter was heard in the Superior Court of New Jersey, Law Division on the merits in a trial de novo on April 11, 1985. Thereafter, the Superior Court Judge rendered a written decision affirming the conviction. This decision was reduced to an Order dated May 29, 1985.

The Defendant then filed an appeal with the Appellate Division of the Superior Court. The Defendant contended, inter alia, that the alleged statements of the Defendant of why he would not take the breath test and his refusal to take the breathalyzer test were erroneously admitted into evidence and commented upon by the Prosecutors.



The Appellate Division rendered a per curiam decision addressing only the Defendant's sentencing argument. The Court essentially affirmed on the Decision of the Law Division Judge under the applicable Court rule.

The Defendant then filed a Notice Petition for Certification with the New Jersey Supreme Court. This Petition was granted by the Court. See, State v. Stever, 104 N.J. 436, 517 A. 2d 428 (1986). The appeal addressed two issues: (1) the alleged Miranda violation, a federal constitutional issue; and (2) the refusal issue under New Jersey Constitutional grounds. The New Jersey Supreme Court rendered its decision on June 30, 1987. It held adverse to the Defendant on both issues. Here, the Defendant seeks review of the federal issue only.



As the New Jersey Supreme Court's opinion states, the facts of the case are largely uncontroverted; but Defendant contends there is a key omission in the factual recitation of the New Jersey Supreme Court. That factual statement is set forth at pages 2 to 6 of the Court's Opinion. See, Appendix 2 to 6, 107 N.J. at 545 to 548. In short, the Defendant was arrested for driving while intoxicated. He was then taken to the police station. He was not given a Miranda warning because, under State v. Macuk, 57 N.J. 1, 268 A. 2d 1 (1970) the New Jersey Supreme Court had held that the Miranda rules do not apply to drunk driving cases.

The Macuk case was effectively overruled while this case was on direct appeal by this Court's decision in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed 2d 317 (1984).

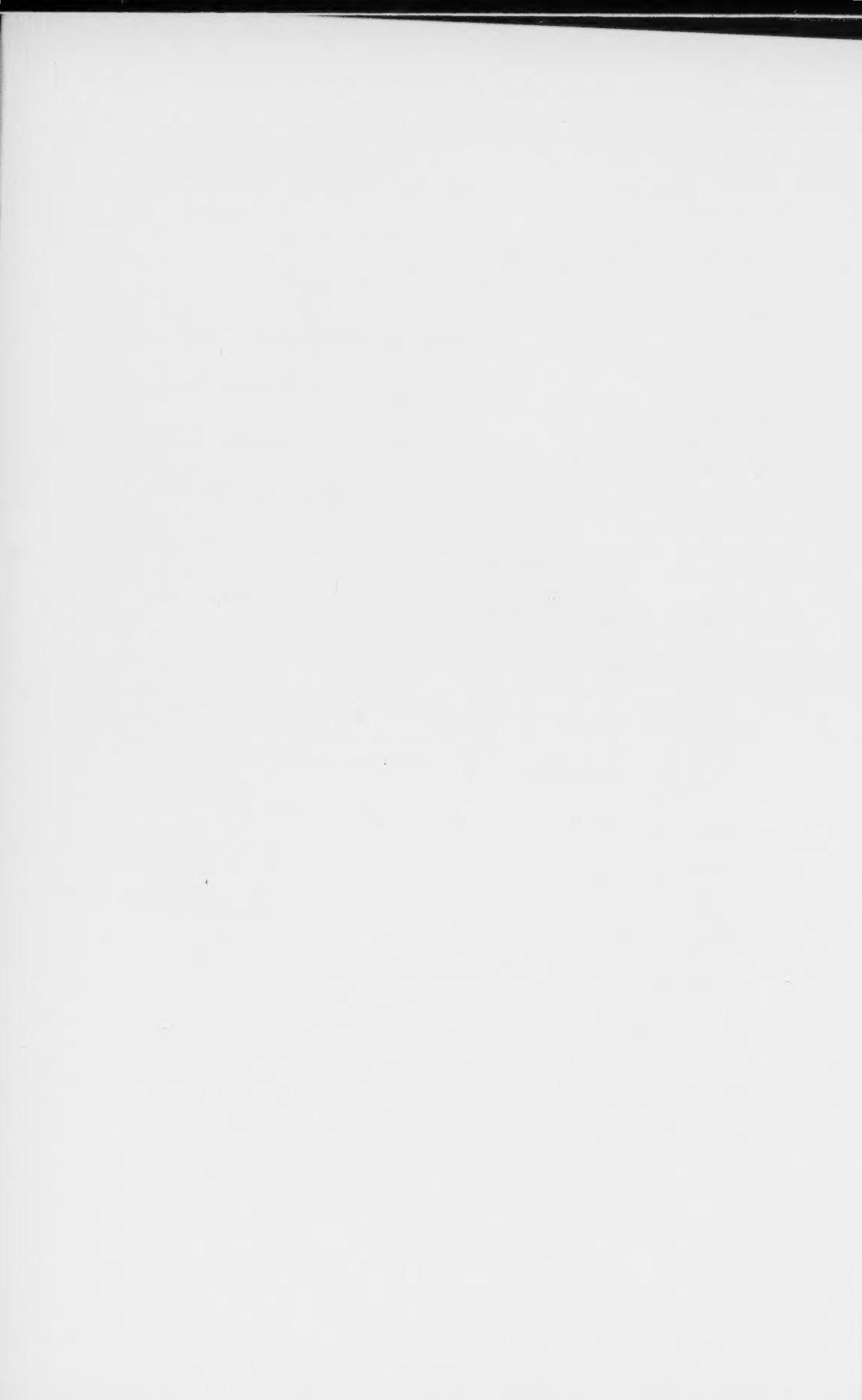
The New Jersey Supreme Court held that, under Griffith v. Kentucky, 479 U.S.

_____, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), Berkemer applies retroactively to this case, because the Berkemer decision was reported between the initial Municipal Court trial and the trial de novo in the Superior Court, Law Division. This federal issue was raised by the Defendant in the Law Division, as reflected by the written opinion of the Court. See, Appendix 34 to 36.

The New Jersey Supreme Court correctly applied Berkemer retroactively, but in doing so, erroneously drew the line between questions that are interrogation and those that are not interrogation. In this respect, the Supreme Court's opinion is incomplete. Upon reading the factual statements at page 4 of the opinion, one would get the impression that the defendant voluntarily

blurted out the statement that he would be "fucked" if he took the breath test in response to a question, "Will you take a breath test?" This is not what happened.

At 3:15 A.M., Officer Origoni read to the Defendant a document entitled the "Alcohol Breathalyzer Refusal Form". The form consists of nine numbered paragraphs. Generally, it advises the defendant that he was arrested for driving while intoxicated and that he is required to take a breath test by law, N.J.S.A. 39:4-50.2. The Fourth paragraph advises the defendant that he has no right to consult a lawyer--or anyone else--before taking the test. The form also warns that refusal to submit to the test will lead to the issuance of a summons for violation of N.J.S.A. 39:4-50.2. The penalties attendant to this are specified, but the form does



not advise that the refusal to take the test can be used as evidence in a trial on the charges of driving while intoxicated.

On cross examination, Officer Origoni was asked the following series questions on what happened next:

[Mr. Atkins]: Q. I believe you testified that Mr. Stever, when asked to take the breath test, at first said "I refuse but I'll take it".

[Officer Origoni]: A. Yes, sir, he did say that.

Q. Was any attempt made to give him the test at that point?

A. Yes sir.

Q. And what happened?

A. Then Mr. Stever said "no, I'm not going to take it".

The machine was set up, he was starting to be questioned by Patrolman Arnone, then he said "no, I won't take the test".

But, in answer to his answer "no I refuse but I will take it", there was a clarification made like "what do you mean you're going to take it but I won't take it....I refuse but I will take it".

Q. And what did he say?

A. He said "I'll hang myself if I take the test".

The fact that the admission was made in response to a follow-up question was verified by the direct testimony of the backup Officer Arnone:

the defendant was read the [Breathalyzer Refusal] form at which time he stated "I refuse but I'll take it". Patrolman Origoni attempted to clarify that and the defendant requested to read the form for himself shortly thereafter. While attempting to clarify the defendant said he would not take it, using the four-letter word of basic Anglo-Saxon to describe why he wouldn't take it. And he was then given the form to read for himself which he did read. Subsequently Patrolman Origoni read the refusal form to Mr. Stever two more times at which time he refused both times to take the breathalyzer test.

The issue, then is whether the clarification crossed the line to become interrogation.



REASONS FOR GRANTING WRIT

POINT I

THE POLICE OFFICERS DID MORE THAN
MERELY REQUEST THE DEFENDANT TO
TAKE A BREATHALYZER TEST, AND
THE ADDITIONAL QUESTIONING BECAME
"INTERROGATION"

The New Jersey Supreme Court correctly opined that "Miranda warnings must be administered only in the context of custodial interrogation. [citation omitted]" State v. Stever, supra, 107 N.J. at 552. Obviously, it follows that any truly voluntary statements made by a suspect -- not the result of interrogation -- are always admissible. Id. The line between an admissible voluntary statement and a statement elicited through interrogation is an elusive one, however.

This is because, in South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) this Court held that a defendant's refusal to take a chemical breathalyzer test can be

admitted in evidence even if the defendant is not given a Miranda warning. In a footnote, the court opined that the question of whether a suspect will take a breath test is not "interrogation" because that request is the type of routine questioning that does not constitute "interrogation" as defined by Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). See, Id. at 564 n. 15, 103 S. Ct. at 923 n. 15, 74 L. Ed 2d at 759 n. 15.

In the Innis case, the court states:

We conclude that Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. This is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response 'from the suspect'. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather



than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

[footnotes omitted]

Id. at 301-302, 100 S. Ct. at 1689-1690

It could be unforeseeable that the question, "Will you take the breath test?" will lead to an incriminating response - "No, I am too drunk". Therefore, if the issue here was as the New Jersey Supreme Court stated, "whether a police request for a suspect to take a breathalyzer test is "interrogation", the answer would be no. See, State v. Stever, supra, 107 N. J. at 552-553.



The New Jersey Supreme Court erred when it did not consider the fact that the police here did not merely request the defendant to submit to a chemical test. As testified to by the officers, a "clarification" was sought when the defendant made a seemingly ambiguous response. This question, "What do you mean?" is more than the routine question whether the defendant take the test. It was designed to probe the consciousness of the defendant and ascertain his thoughts. See, McCormick on Evidence 301-306 (3d ed. 1984).

As such, the police should have known that the attempt at clarification was reasonably likely to elicit an incriminating response. The underlying intent of the police is not relevant. It is bad enough that the defendant can be subjected to inquiry as to whether he will take a chemical test. If the

police then probe for the reason for a response to the routine question, the line is crossed and interrogation takes place.

POINT II

THIS COURT SHOULD CLARIFY THE DISTINCTION BETWEEN ROUTINE QUESTIONING AND INTERROGATION IN THE DRUNK DRIVING CONTEXT.

The Court should clarify the distinction between routine questioning and interrogation in the drunk driving context. The court should grant the within Writ to clear up the ambiguity highlighted by this case. Neville allows routine questioning of a defendant regarding a chemical test because the test itself is not within the Fifth Amendment protection. But the defendant's thoughts regarding his reasoning for taking the test, or refusing to take the test, is testimonial and privileged.

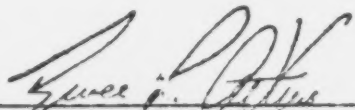


In this respect, the New Jersey Supreme Court failed to address the key distinction. This court should, therefore, make it clear that if the police feel they must clarify a response, this should be done only after the Miranda ruling has been complied with.

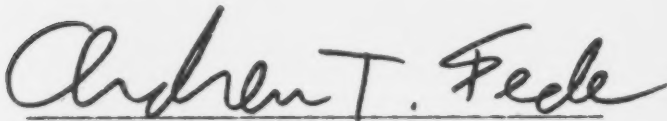
CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



BRUCE L. ATKINS, ESQ.
Counsel for Petitioner



ANDREW T. FEDE, ESQ.
On the Brief

Dated: August 26, 1987.



APPENDIX

SUPREME COURT OF NEW JERSEY
A- 75 September Term 1986

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

CHARLES D. STEVER,

Defendant-Appellant.

Argued January 6, 1987-
Decided June 30, 1987

On Certification to the Superior
Court, Appellate Division.

Bruce L. Atkins argued the cause
for appellant (Contant, Contant,
Schuber, Scherby & Atkins,
attorneys; Andrew T. Fede, on the
briefs).

Boris Moczula, Deputy Attorney
General, argued the cause for re-
spondent (W. Cary Edwards, Attorney
General of New Jersey, attorney).

The opinion of the Court was de-
livered by HANDLER, J.

Defendant, Charles D. Stever seeks
reversal of his conviction for driving
while under the influence of intoxicating
liquor, contrary to N.J.S.A. 39:4-50(a).
This appeal presents us with the
following issues; whether the Supreme
Court's decision in Berkemer v. McCarty,

468 U.S. 420, 82 L.Ed 2d 317 (1984), requiring the administration of Miranda warnings in connection with arrests for minor traffic offenses, should be applied retroactively; whether a police officer's request for a suspect to submit to a breathalyzer test constitutes "interrogation" within the meaning of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694 (1966); and whether a defendant's refusal to submit to a breathalyzer test may be used as evidence against him on a charge of driving while intoxicated.

I.

The facts of this case are largely uncontroverted. On January 4, 1984, at approximately 7:30 P.M., defendant, Charles D. Stever, finished work at his job as a greenhouse construction worker. After stopping at his home in Park Ridge for one hour, defendant reported to the Ski Barn in River Edge, where he held a second job. At approximately 11:45 P.M., defendant left this



store and proceeded to a friend's place of business in Westwood. Defendant testified that while at his friend's store, he consumed two 12-ounce beers over a one-hour period. Thereafter, defendant and his friend went to a bar called "Talk of the Town" where defendant says that he had one more beer. Defendant left this bar at 3:00 a.m. and proceeded to Broadway Avenue in Woodcliff Lake.

At approximately 3:05 a.m., Officer Michael Origoni of the Woodcliff Lake Police Department began to follow defendant's automobile. Officer Origoni testified that defendant was travelling at 27.5 miles per hour in a 35 mph zone, and that he observed defendant's car cross the center line twice. Consequently, Origoni stopped defendant's vehicle and asked to see his driver's license, insurance and registration. According to the officer, defendant had difficulty producing these documents. Origoni also

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observed an open, half-full bottle of beer in the center console of the car and noticed that defendant's face was flushed, that his eyes were bloodshot, and that his breath carried an odor of alcohol.

Officer Origoni requested that defendant step out of his car and undertake certain field sobriety tests. By this time, Patrolman Michael Arnone had arrived at the scene and witnessed all tests administered. Defendant was asked twice to recite the alphabet and, according to Origoni, failed on each attempt, speaking in a slow, slurred manner and mixing up the order of the letters. The officer testified that defendant was also unable to perform two motor coordination tests; the heel-to-toe test, and the "finger-to-nose" test. After the completion of the tests, Origoni asked defendant where he had been earlier in the evening. Defendant replied that he had been at "Talk of the Town" where he imbibed

three or four bottles of beer.

Defendant testified to a different version of the events at the scene of the stop, asserting that he successfully performed all field sobriety tests administered by Origoni. However, Patrolman Arnone's testimony substantially corroborated Origoni's version of the incident. Arnone's description of defendant's failure of the field tests mirrored Origoni's testimony. Moreover, Officer Arnone testified that defendant's face was flushed; that his eyes were bloodshot, watery and glassy; that his speech was slurred; and that he was unable to maintain his balance while speaking to Origoni.

After the sobriety tests, Officer Origoni placed defendant under arrest, searched him, and took him to police headquarters. Arnone testified that upon arriving at the station, defendant staggered up the stairs, swayed, and leaned against a wall for support.

Origoni similarly stated that defendant could not stand without support from nearby filing cabinets.

At police headquarters, the Alcohol Breathalyzer Refusal Form ¹ was recited to defendant four times. After each recital, defendant refused requests to submit to a breathalyzer test. After one request, defendant told Origoni that he would be "fucked" if he took the breathalyzer test.²

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In relevant part, the Alcohol Breathalyzer Refusal Form advises the accused that he is required by law to take a breath test and that a refusal to do so constitutes a violation of N.J.S.A. 39:4-50.2 and will result in a fine of not less than \$250.00 and a license suspension of six months. N.J.S.A. 39:4-50.4a. See State v. Leavitt, ___ N.J. ___ (1987), a case decided today, discussing the Alcohol Breathalyzer Refusal Form.

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At trial, defendant asserted that he meant only that he would be prejudiced if the breathalyzer test results were inaccurate.



At no point subsequent to the initial stop was defendant advised of his Miranda rights.

Defendant was convicted in the Municipal Court of Woodcliff Lake of operating a motor vehicle while under the influence of intoxicating liquor, contrary to N.J.S.A. 39:4-50(a), refusing to consent to a breathalyzer test, in violation of N.J.S.A. 39:4-50.2, and consuming an alcoholic beverage while operating a motor vehicle, contrary to N.J.S.A. 39:4-51a. On the driving-while-intoxicated charge, defendant received a sentence of 180 days imprisonment, a \$1,000.00 fine, and a 10-year suspension of driving privileges.³

³ This was defendant's third conviction under N.J.S.A. 39:4-50(a). The prior convictions occurred seven and nine years before the trial.

On the refusal charge, defendant received a \$250.00 fine and a license suspension of six months. Finally, for the charge of consumption while operating a motor vehicle, the court assessed a \$200.00 fine.

Defendant appealed his driving-while-intoxicated conviction to the Superior Court, Law Division; he did not appeal his other two convictions. The Superior Court remanded the case to the Municipal Court for additional testimony concerning alibi witnesses. The Municipal Court conducted a second hearing, found defendant guilty, and imposed the original sentence. Defendant appealed his conviction a second time. The Superior Court conducted a de novo review of the record and affirmed both the conviction and sentence.

Defendant filed a notice of appeal with the Appellate Division, arguing,

inter alia, that his conviction should be overturned on the following grounds; (1) defendant's post-arrest statements were erroneously admitted at trial since defendant was not advised of his Miranda rights; and (2) the trial court erred in admitting evidence of defendant's refusal to submit to a breathalyzer test. The Appellate Division, in an unpublished opinion, affirmed defendant's conviction and sentence, finding defendant's contentions to be "clearly without merit" under Rule 2:11-3(e)(2).

We granted certification, 104 N.J. 436 (1986).

II.

Defendant first argues that the Supreme Court's decision in Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317, requires suppression of his post-arrest statements. In Berkemer, the Court extended its ruling in Miranda v. Arizona, supra, 384 U.S. 436, 16

L.Ed. 2d 694, to arrests for minor traffic violations, holding that a failure to give the Miranda warning in these situations will lead to suppression of all post-arrest responses to police interrogation. Id. at 331. The State contends that Berkemer should not govern in defendant's case because this opinion was issued subsequent to his arrest. In addition, the State argues that even if Berkemer applies, defendant's statements are admissible since they were not given in response to police interrogation. Thus, we must first decide whether the Court's ruling in Berkemer should be given retroactive effect. This determination requires an examination of Supreme Court decisions dealing with the retroactivity of new rules of criminal procedure.

In United States v. Johnson, 457 U.S. 537, 73 L.Ed. 2d 202 (*1982), the Supreme Court attempted to clarify the law governing the retroactive effect of its criminal procedure precedents, an

area that had been marked by inconsistency and confusion. There, the Court dealt with the retroactivity of Payton v. New York, 445 U.S. 573, 61 L.Ed. 2d 639 (1980), which held that the fourth amendment prohibits the police from making a warrantless, non-consensual entry into a suspect's home to make a routine felony arrest. The Court ruled that its decisions "construing the Fourth Amendment [are] to be applied retroactively to all convictions that [are] not yet final at the time the decision [is] rendered." United States v. Johnson, supra, 457 U.S. at 562, 73 L. Ed. 2d at 224.⁴

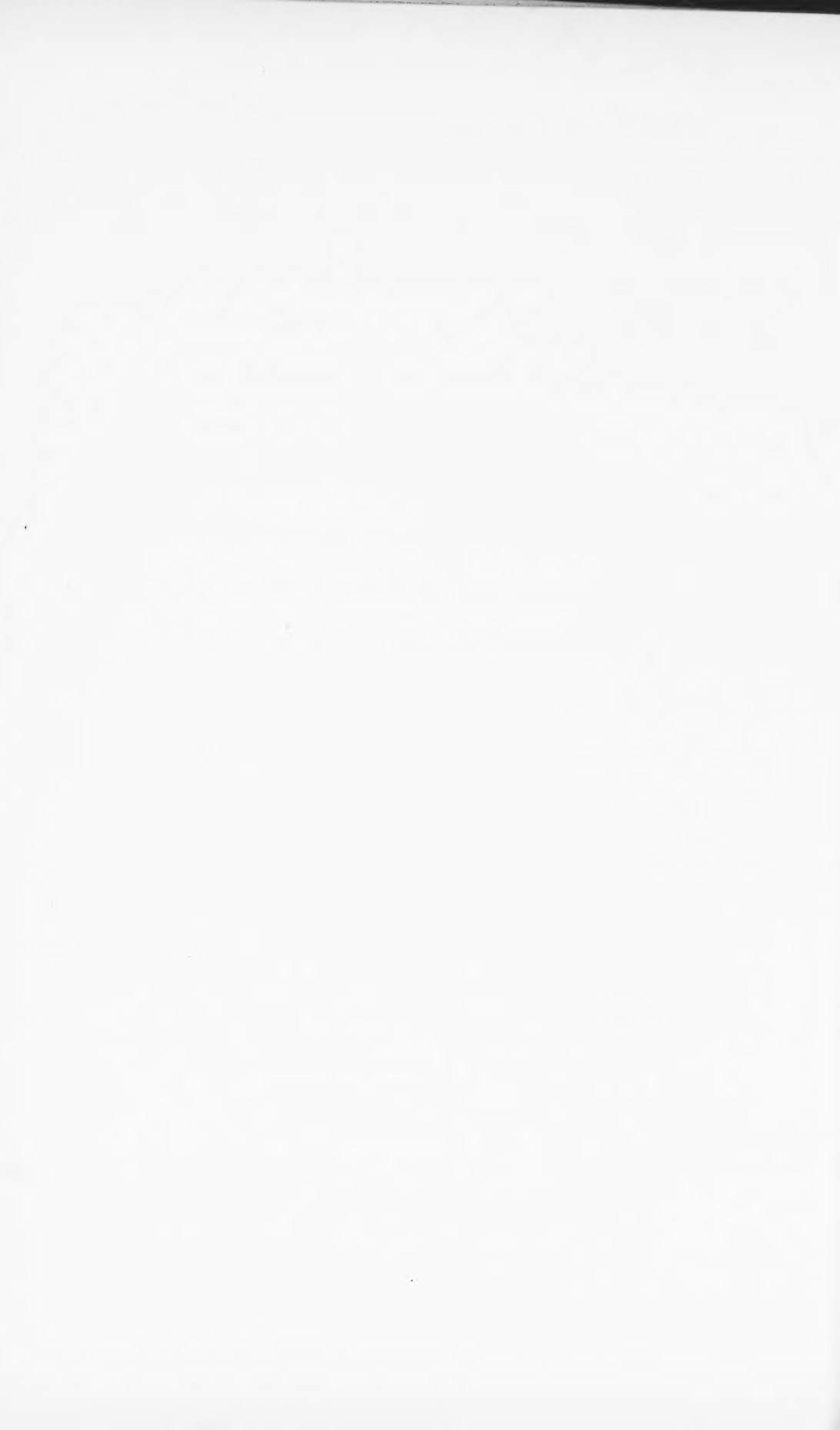
⁴ The Court expressed no view as to the retroactive application of decisions construing any constitutional provision other than the fourth amendment. United States v. Johnson, supra, 457 U.S. at 562, 73 L.Ed. 2d at 222. However, in Shea v. Louisiana, 470 U.S. 51, 59 L.Ed. 2d 38, 47 (1985), the Court held that the Johnson rule is to be applied in all direct appeals involving the retroactive effect of its fifth amendment rulings.



However, the Court articulated an exception to this general proposition, holding that a new rule of criminal procedure that represents a "clear break with the past" should not be given retroactive effect. Id. at 549, 73 L.Ed. 2d at 213.⁵ The Court stated that a finding of non-retroactivity is compelled in these cases because of the reliance by law enforcement authorities on the superseded law and because of the deleterious effect on the administration of justice that retroactive application would produce. Id. at 550, 73 L.Ed. 2d at 214.⁶

⁵ The Supreme Court held that a "clear break with the past" exists only when a decision (1) explicitly overrules a past precedent of the Supreme Court; (2) disapproves a practice that the Supreme Court has arguably sanctioned in prior cases; or (3) overturns a longstanding and widespread practice to which the Supreme Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. United States v. Johnson, supra, 457 U.S. at 551, 73 L.Ed. 2d at 215.

⁶ In State v. Gervasio, 94 N.J. 23, 27 (1983), we relied on the "clear break" test articulated in Johnson in holding that the Supreme Court's ruling in Delaware v. Prouse, 440 U.S. 648, 59



In Griffith v. Kentucky, 479 U.S. _____, 93 L.Ed. 2d 649 (1987), the Supreme Court undertook a re-examination of the rationale underlying the "clear break" exception to the general proposition that new rules of criminal procedure should be retroactive to cases pending on direct review.⁷ After reviewing its precedents dealing with the issue of retroactivity, the Court abolished the exception, ruling:

[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

6(cont)

L.Ed. 2d 660 (1979) (random stops of vehicles on public roads violates fourth amendment) should not be applied retroactively .

⁷ The Supreme Court was dealing with the retroactive application of Baston v. Kentucky, _____ U.S. _____, 90 L.Ed. 2d 69 (1986), which held that a defendant in a state criminal trial can establish a prima facie case of racial discrimination, violative of the fourteenth amendment, based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire.

[Id. at __, 93 L.Ed. 2d at 661.]

The Court stated that once it propounds a new rule in a given case, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." Id. at __, 93 L.Ed. 2d at 658. In addition, the Court noted that abandoning the "clear break" exception furthers the proposition that similarly situated defendants should be treated the same. Id. at 93, 92 L.Ed. 2d at 661.

We conclude that the rule articulated in Griffith v. Kentucky, supra, 479 U.S. ___, 93 L.Ed. 2d 649, mandates the retroactive application of Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317, to the facts of this case. The State's arguments to the contrary are wholly unpersuasive. The State contends that the Griffith rule inapplicable to Supreme Court decisions that "extend [the] long-

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standing rule of exclusion first announced in Miranda."

This assertion is based on the Court's decision in Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed. 2d 882 (1966), which applied the three-prong retroactivity test first articulated in Linkletter v. Walker, 381 U.S. 618, 14 L.Ed. 2d 601 (1965),⁸ and refused to give retroactive effect to Miranda v. Arizona, supra, 384 U.S. 436, 16 L.Ed. 2d 694. The Court held that prospective application of Miranda is "particularly appropriate" because of the unjustifiable burden on the administration of justice" which retroactivity would produce. Johnson v. New Jersey, supra, 384 U.S. at 732-33, 16 L.Ed. 2d at 892. For the following reasons, the State's position is incorrect.

⁸ The Linkletter test established three criteria for determining the retroactivity of new rules of criminal procedure: (1) the purpose behind the new rule; (2) any reliance by law-enforcement authorities on the prior rule of law; and (3) the effect on the administration of justice of retro-

First, the language of Griffith v. Kentucky, supra, 479 U.S., ____, 93 L.Ed. 2d 649, is clear and unambiguous, allowing for no exceptions. The Court holds simply that "a new rule for the conduct of criminal prosecutions is to be applied retroactively." Id. at ____, 93 L.Ed. 2d at 661. Second, the Linkletter retroactivity test that was applied in Johnson v. New Jersey, supra, 384 U.S. 719, 16 L.Ed. 2d 882, was explicitly overruled in United States v. Johnson, supra, 457 U.S. 537, 73 L.Ed. 2d 202, at least with regard to those cases pending on direct review. Third, the State argues essentially that Supreme Court decisions extending Miranda should not be given retrospective effect because of the unjustifiable burden on the administration of justice" that such an action

8 (cont.)
active application. Linkletter v. Walker, supra, 381 U.S. at 629, 14 L.Ed. 2d at 608.

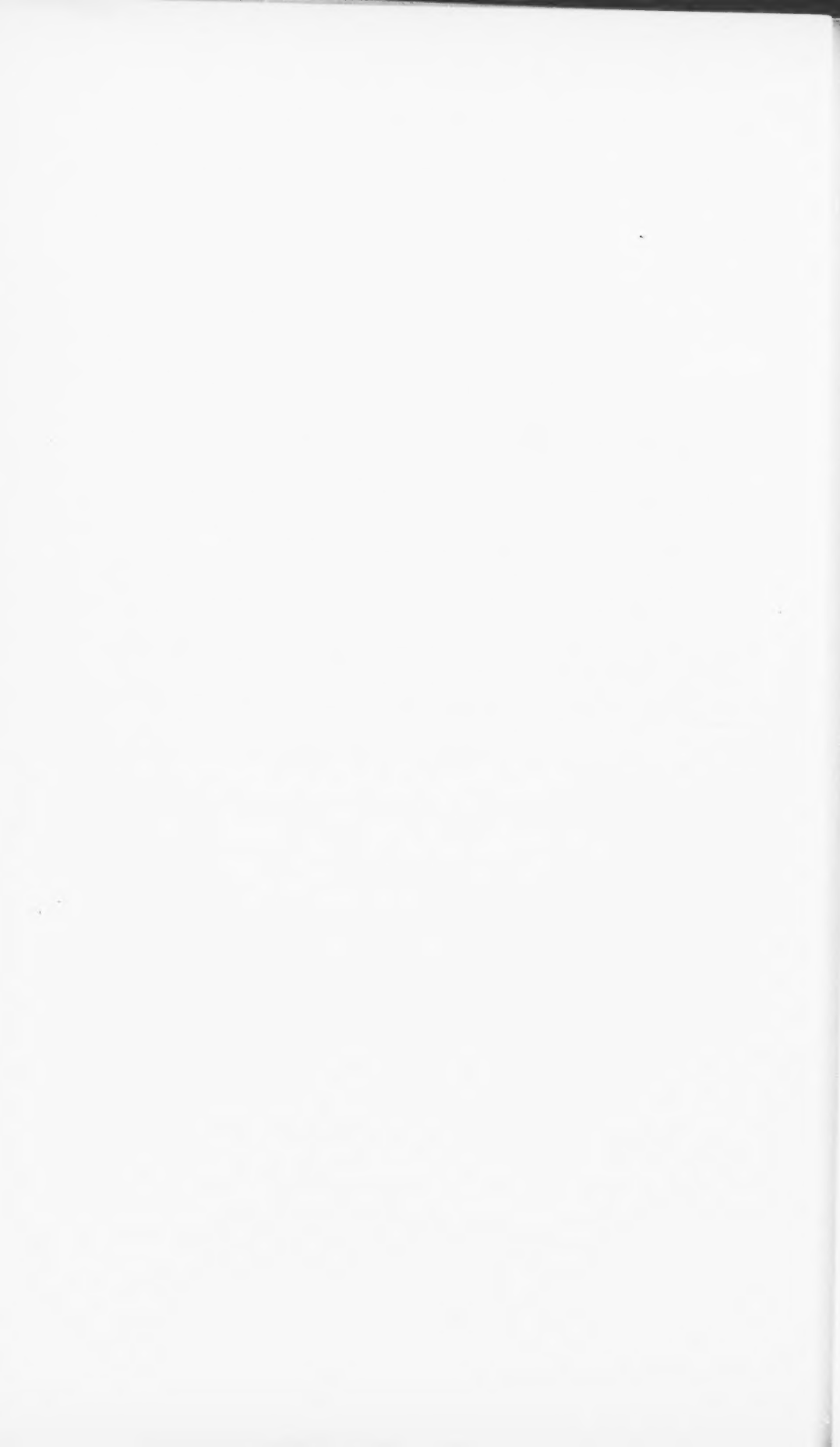
would produce. This assertion is nothing more than a re-articulation of the "clear break" rationale, which was explicitly abandoned in Griffith v. Kentucky, supra, 479 U.S. at _____, 93 L.Ed. 2d at 661. The Supreme Court specifically rejected this factor as a relevant consideration in determining the retroactivity of new rules of criminal procedure. Finally, the premise underlying the State's argument is erroneous. Supreme Court decisions that "extend [the] long-standing rule of exclusion first announced in Miranda" have been given retroactive effect. In Shea v. Louisiana, 470 U.S. 51, 84 L.Ed. 2d 38 (1985), the Court held that the fifth-amendment rule announced in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed. 2d 378 (1981), is retroactive to cases on direct review when Edwards was decided.

⁹ In Griffith, supra, 479 U.S. at _____, 93 L.Ed. 2d at 660, the Court noted that its opinion in Shea ex-

Our determination that Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317, must be retroactively applied to the facts of this case does not end our inquiry as to the admissibility of defendant's post-arrest statements. The State contends that even if Berkemer governs, defendant's statements were not given in response to police interrogation and are, therefore, admissible.

It is settled that Miranda warnings must be administered only in the context of a custodial interrogation. Miranda v. Arizona, supra, 384 U.S. at 444, 16 L.Ed. 2d at 706. Voluntary statements-- those not elicited through interrogation-- made by a suspect while in custody are admissible at trial. Id. at 478, 16 L.Ed. 2d at 726. The question 9 (cont.) pressed some doubt about the continued viability of the "clear break" exception but that there was no need to decide the issue in that case. Shea v. Louisiana, supra, 470 U.S. at 59 n. 5, 84 L.Ed. 2d at 46 n. 5.

is whether a police request for a suspect to take a breathalyzer test is "interrogation within the meaning of Miranda, In Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed. 2d 297 (1980), the Supreme Court, addressing the issue for the first time, held that police words or actions "normally attendant to arrest and custody" are not included within definition of "interrogation". Id. at 301, 64 L.Ed. 2d at 308. In South Dakota v. Neville, 459 U.S. 553, 74 L.Ed. 2d 748 (1983), the Supreme Court ruled that asking a suspect to submit to a blood-alcohol test falls within this exception to the definition of "interrogation" and that a suspect's "choice of refusal thus enjoys no prophylactic Miranda protection." Id. at 564 n. 15, 74 L.Ed. 2d at 759 n. 15; see also State v. DeLorenzo, 210 N.J. Super. 100, 104 (App. Div. 1986) ("a simple request to submit to a chemical test does not constitute interrogation.") Consequently,



defendant's statement that he would be "f...d" if he took a breathalyzer test was made in response to custodial interrogation and was properly admitted into evidence at defendant's trial.

In sum, we hold that the Supreme Court's decision in Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317 must be applied to the facts of this case. However, that decision does not compel the suppression of defendant's post-arrest statements since those statements were not made in response to police interrogation while defendant was in custody.

III.

Defendant bases his second ground for reversal on the contention that the trial court erred in admitting evidence of his refusal to submit to a breathalyzer test. Defendant argues that this evidence is inadmissible under New Jersey's common-law privilege

against self-incrimination and under the State Constitution 's due process clause.

In South Dakota v. Neville,
supra,

459 U.S. 553, 74 L.Ed. 2d 748, the Supreme Court considered, and rejected, the same arguments made by this defendant, but in the context of federal constitutional guarantees. There, the defendant was arrested for driving while intoxicated and was asked to submit to a blood-alcohol test. Prior to this request, the defendant was warned of the consequences of a refusal. Id. at 555 n. 2, 74 L.Ed. 2d at 753 n. 2. This warning was substantially similar to the one that was recited to defendant in this case. Supra at 3 n. 1.¹⁰ The defendant refused to take the test, stating: "I'm too drunk, I won't pass the test." Id. at 555, 74 L.Ed. 2d at 753-54.

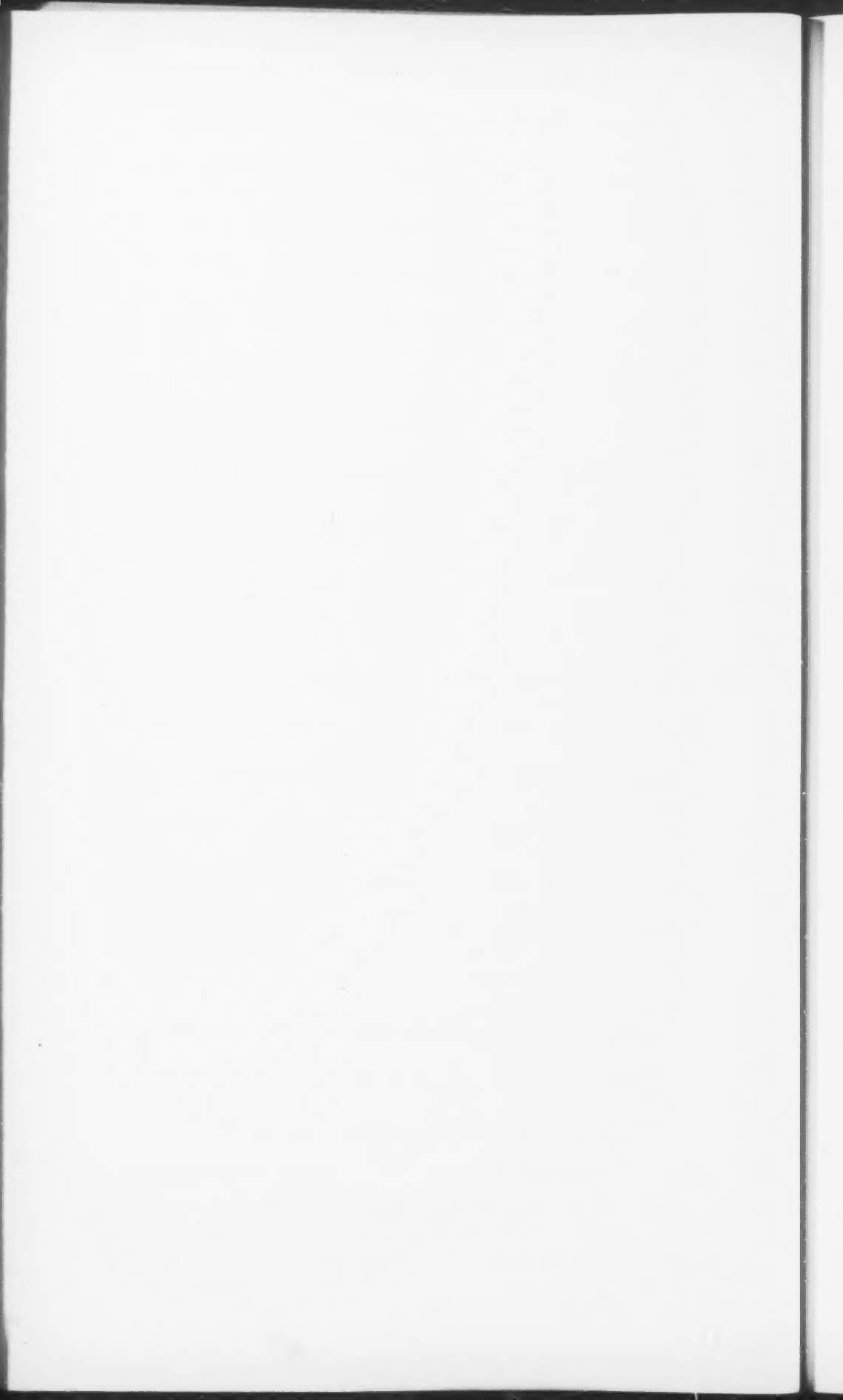
¹⁰ Neither warning advised the



On the fifth amendment issue, the Supreme Court first noted that most courts have held that the introduction of refusal evidence does not violate a defendant's privilege against self-incrimination. Id. at 560, 74 L.Ed. 2d at 757. Many of these courts have based their conclusions on the ground that a refusal to submit to a blood-alcohol test is a physical act rather than a communication. Id. at 560, 74 L.Ed. 2d at 757. However, the Supreme Court did not rest its holding on this rationale, stating that "the distinction between real or physical evidence, on the other hand, and communications or testimony, on the other, is not readily drawn in many cases". Id. at 561, 74 L.Ed. 2d at 757. Instead, the Court held that the privilege against self-incrimination is not violated under these circumstances because the refusal

10(cont'd.)

suspect that a refusal to submit could be used against him at his trial for driving while intoxicated.



of a suspect to submit to a blood-alcohol test is not a result of state compulsion. Id. at 562, 74 L.Ed. 2d at 757-58.

In arriving at its holding, the Court first noted that a state may force person suspected of driving while intoxicated to submit to a blood-alcohol test. Id. at 559, 74 L.Ed. 2d at 756. ¹¹ The Court observed, however, that South Dakota, rather than authorizing police officers to administer such tests against a person's will, allows a suspect to refuse the test but attaches certain penalties to a refusal. The Court concluded that this legislatively-created choice does not compel a suspect to refuse:

"Given...that the offer of taking a

¹¹ The Court based this conclusion on its earlier decision in Schmerber v. California, 384 U.S. 757, 16 L.Ed. 2d 908 (1966), which held that a state-compelled blood test, because it is physical evidence rather than testimonial evidence, does not violate the fifth amendment.



blood-test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." Id. at 563, 74 L.Ed. 2d at 758-59. ¹²

In South Dakota v. Neville, *supra*, 459 U.S. at 564, 74 L.Ed. 2d at 759, the defendant also argued that the federal due process clause requires that police warn a suspect that a refusal to submit to a blood-alcohol test may be used against him at trial. The Supreme Court rejected this contention on two grounds. First, the Court contrasted the rationale underlying the Miranda warnings, stating that the right to silence is one of constitutional

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The Court emphasized that the blood-alcohol test is safe, painless, and commonplace, and, therefore, did not constitute an alternative that would almost inevitably lead to a refusal. South Dakota v. Neville, *supra*, 459 U.S. at 563, 74 L.Ed. 2d at 758.

dimension and thus cannot be unduly burdened. Id. at 565, 74 L.Ed. 2d at 759-60. In contrast, a suspect's right to refuse a blood-alcohol test "is simply a matter of grace bestowed by the . . . Legislature." Id. at 565, 74 L.Ed. 2d at 760. Consequently, there can be no constitutionally-mandated requirement that a suspect be advised of the consequences of exercising this "right". Second, the Court noted that the defendant was specifically warned that a refusal to submit to a blood-alcohol test could lead to a suspension of his driving privileges. Id. at 566, 74 L.Ed. 2d at 760. This warning made it clear that a refusal is not a "safe harbor" free of adverse consequences. Consequently, the Court held that the warning "was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial" and, therefore, "comported with the fundamental fairness



required by due process." Id. at 566,
74 L.Ed. 2d at 760.

Notwithstanding the Supreme Court's decision in South Dakota v. Neville, supra, 459 U.S. 553, 74 L.Ed. 2d 748, defendant argues that the admission into evidence of his refusal to submit to a breathalyzer test is barred by New Jersey's common-law privilege against self-incrimination and by the State Constitution's due process clause. Thus, we must decide whether these state law protections should be given a more expansive construction than their federal counterparts.

The New Jersey Constitution contains no provision guaranteeing the right to be free from compelled self-incrimination. However, this privilege has been firmly established as part of our State common law, State v. Hartley, 103 N.J. 252, 260 (1986), and is now included in the Rules of Evidence, Rules

23 through 25, codified at N.J.S.A. 2A:84A-17 to -19¹³ The State Constitution does contain a due process clause. N.J. Const. of 1947, Art. 1, para. 1.¹⁴ It is well-settled that our State laws, both constitutional and common, may provide greater protections than their federal counterparts. See, e.g., State v. Novembrino, 105 N.J. 95 (1987); In the Matter of Grand Jury Proceedings of Joseph Guarino, 104 N.J. 218 (1986);

¹³ In particular, Evidence Rule 25 states in relevant part:

[E]very natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him... except that under this rule: (a) no person has the privilege to refuse to submit to examination for the purpose of discovery or recording his corporal features and other identifying characteristics or his physical or mental condition. N.J.S.A. 2A:84-19(a).

Article 1, paragraph 1 provides:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

State v. Hunt, 91 N.J. 338 (1982);
Right to Choose v. Byrne, 91 N.J. 287
(1982); State v. Alston, 88 N.J. 211
(1981); State v. Johnson, 68 N.J. 349
(1975). However, it is equally settled
that such enhanced protections should be
extended only when justified by "[s]ound
policy reasons." State v. Hunt, supra,
91 N.J. at 345; State v. Williams, 93
N.J. 39, 59 (1983); see also Right to
Choose v. Byrne, supra, 91 N.J. at 301
("We proceed cautiously before declaring
rights under our state Constitution that
differ significantly from these
enumerated by the United States Supreme
Court in its interpretation of the
federal Constitution.")

In this case, the public policy of
our State does not support an expansion
of state law protections beyond those
provided by the federal constitution. We
have consistently stated that "the clear
public policy of this State is to rid the

highways of drunken drivers." State v. Dyal, 97 N.J. 229, 239 (1984); see also Kelly v. Gwinnell, 96 N.J. 538, 545 (1984); (this "social goal -- the reduction of drunken driving --... is practically unanimously accepted by society.") In a case decided this term, State v. Tischio, ____ N.J. ____ (1987), we reiterated this important public policy, stating:

The overall scheme of (New Jersey's drunk-driving) laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive.

A determination that a suspect's refusal to submit to a breathalyzer test is inadmissible at his trial for driving while intoxicated would frustrate and impede this strong and consistent public policy. In sum, relevant policy considerations strongly buttress our adoption of the holding of the Supreme

Court in South Dakota v. Neville, supra, 459 U.S. 553, 74 L.Ed. 2d 748, as the proper construction of our State constitutional and common-law protections.

Although we have not previously addressed the precise issues raised by defendant, the decisional law in this area supports our conclusion that a suspect's refusal to submit to a breathalyzer test is admissible in evidence. We have consistently held that the taking of a breathalyzer test is non-testimonial in nature and, therefore, is not covered by the privilege against self-incrimination. State v. Macuk, 57 N.J. 1, 15 (1970); State v. Blair, 45 N.J. 43, 46 (1965); State v. King, 44 N.J. 346, 357 (1965). Thus, the State may force a suspect to submit to a chemical test of bodily substances to determine the amount of alcohol in his blood. State v. Macuk, supra, 57 N.J. at 14.

It follows then that the refusal to

take such a test is non-testimonial in nature. In State v. Cary, 49 N.J. 343 (1967), we upheld the admissibility of the defendant's refusal to submit to a voice test. In arriving at this holding, the Court ruled that compelling a person to speak for the purpose of a voice identification is not covered by New Jersey's common-law privilege against self-incrimination because the physical properties of a person's voice are not testimonial in character. Id. at 347-48. We contrasted the United States Supreme Court's decision in Griffin v. California, 380 U.S. 609, 14 L.Ed. 2d 106 (1965), which held that a comment by a trial court or prosecutor on a defendant's refusal to testify is unconstitutional. We noted that the Court based its decision on the penalty that such comment imposes on a defendant's exercise of his fifth amendment right. Id. at 614, 14 L.Ed. 2d at 109-10. We held that this rationale is inapplicable

to the issue raised in Cary since the defendant there had no constitutional right to refuse to speak solely for the purpose of a voice identification. State v. Cary, supra, 49 N.J. at 353-54.

In addition, the Court in Cary, supra, 49 N.J. at 354, noted with approval the decision of the California Supreme Court in People v. Sudduth, 65 Cal. 2d 543, 421 P. 2d 401, 55 Cal. Rptr. 393 (1966), which upheld the admissibility of a suspect's refusal to take a breathalyzer test. In arriving at this holding, the reasoning of the California court was identical to that employed in Cary, namely, that Griffin v. California, supra, 380 U.S. 609, 14 L.Ed. 2d 106, is inapplicable because there is no underlying constitutional right on the part of a suspect to refuse to submit to a breathalyzer test. People v. Sudduth, supra, 65 Cal. 2d at 546, 421 P. 2d at 403, 55 Cal. Rptr. at 395.



In State vs. Tabisz, 129 N.J. Super. 80 (app. Div. 1974), the court held that the introduction into evidence of a suspect's refusal to take a breathalyzer test is not barred by New Jersey's common-law privilege against self-incrimination. The court felt this conclusion to be compelled by our earlier decision in State v. Cary, supra, 49 N.J. 343, stating that since "there is no... right to refuse to take the [breathalyzer] test, the failure of one accused to submit to the test is properly admitted into evidence." State v. Tabisz, supra, 129 N.J. Super. 83. In sum, we conclude that the admissibility in evidence of a defendant's refusal to take a breathalyzer test does not offend constitutional or common law structures.

The case law in this area also supports our conclusion that defendant's due process rights were not violated by the police officer's failure to warn defendant that his refusal to submit to a

breathalyzer test may be used against him at trial. Although we have never ruled on this precise issue, we find controlling the reasoning of our earlier opinion in State v. Macuk, supra, 57 N.J. 1.¹⁵ There, one of the issues before the Court was whether a suspect must be apprised of his Miranda rights prior to the administration of a breathalyzer test in order for the results of the test to be admissible at trial. We rejected the applicability of Miranda on the ground that "[t]here is no legal right or choice to refuse, despite the authorized additional penalty for refusal in the case of the breath test." Id. at 15. This reasoning is equally applicable to the issue raised in the present case. The purpose of the Miranda

¹⁵ In State v. Macuk, supra, 57 N.J. at 15-16, we held, inter alia, that the Miranda warnings are inapplicable to all motor vehicle violations. Of course, this holding has since been overruled by Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317.



warning is to protect the underlying constitutional right of a criminal suspect to remain silent.

South Dakota v. Neville, supra, 459 U.S. at 565, 74 L.Ed. 2d at 759-60. Where there exists no underlying constitutional right in need of protection-- as in the case of a refusal to submit to a breathalyzer test-- no warning requirement is constitutionally mandated.

We also find persuasive the Neville Court's conclusion that the warnings given in that case were not fundamentally unfair. Id. at 566, 74 L.Ed. 2d at 760. As in Neville, the defendant in this case was warned that a failure to submit to a breathalyzer test would result in a fine and a suspension of driving privileges. "[I]t is unrealistic to say that the warnings given here implicitly assured [defendant] that no consequences other than those mentioned [would] occur." Id. at 566, 74 L.Ed. 2d at 760. Thus, we see no

reason for reaching a different result under our State Constitution from that arrived at by the Supreme Court in interpreting the federal due process clause.

IV.

In sum, we hold that the trial court did not err in admitting evidence of defendant's refusal to submit to a breathalyzer test. Although Berkemer v. McCarty, supra, 468 U.S. 420, 82 L.Ed. 2d 317, mut be retroactively applied to the facts of this case, this opinion does not compel the suppression of defendant's post-arrest statements. Officer Origoni's request that defendant take a breathalyzer test was an action "normally attendant to arrest and custody" and, therefore, did not constitute "interrogation" under Rhode Island v. Innis, supra, 446 U.S. 291, 64 L.Ed. 2d 297. Consequently, defendant's post-arrest statements were purely voluntary and fully admissible in evidence. Miranda v. Arizona, supra, 384 U.S. at 478, 16 L.Ed. 2d at 726.

We also hold that the admission into evidence of defendant's refusal to submit to a breathalyzer test did not violate defendant's common-law privilege against self-discrimination, nor did it infringe on defendant's due process rights under the State Constitution. A person suspected of driving while intoxicated has no right to refuse to take a breathalyzer test. Consequently, the admission of such refusal at trial impermissibly burdens no constitutional right. See Griffin v. California, supra, 380, U.S. 609, 14 L.Ed. 2d 106; State v. Cary, supra, 49 N.J. 343. Moreover, because there exists no constitutional right in need of protection, the due process clause does not require that a suspect be warned that a refusal may be used against him at trial.

The judgment below is affirmed.

Chief Justice Wilentz and Justices Clifford, Pollock, O'Hern, Garibaldi and Stein join in this opinion.

SUPREME COURT OF NEW JERSEY

No. A-75

September Term 1986

On appeal from _____

On certification to Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES D. STEVER,

Defendant-Appellant.

Decided June 30, 1987

Chief Justice Wilentz Presiding

Opinion by Justice Handler

Dissenting / Concurring opinion by _____

CHECKLIST	Affirm	Reverse	Modify	Concur in Result
Chief Justice Wilentz	X			
Justice Clifford	X			
Justice Handler	X			
Justice Pollock	X			
Justice O'Hern	X			
Justice Garibaldi	X			
Justice Stein	X			
TOTALS	7			

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4393-84T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES D. STEVER,

Defendant-Appellant.

Submitted March 17, 1986,
Decided March 26, 1986

Before Judges J. H. Coleman and Havey.

On appeal from Superior Court of New
Jersey, Law Division, Bergen County.

Contant, Contant, Schuber, Scherby
& Atkins, attorneys for appellant
(Andrew T. Fede on the brief).

PER CURIAM

Defendant was found guilty in the
Municipal Court of Woodcliff Lake of
consuming an alcoholic beverage while
operating a motor vehicle (N.J.S.A. 39:
4-51a), refusing to submit to a breath-
alyzer test (N.J.S.A. 39:4-50.2), and
driving while intoxicated (N.J.S.A.
39:4-50). Upon his de novo appeal to



the Law Division from the conviction of driving while under the influence of alcohol, defendant was again found guilty. Defendant's driving privileges were suspended for ten years as a third offender and he was sentenced to 90 days of community service, 90 days in an in-patient alcoholic rehabilitation facility and fined \$1,000.00.

Defendant has appealed contending:

1. DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE LOWER COURT ERRONEOUSLY FAILED TO SUPPRESS DEFENDANT'S STATEMENTS ALLEGEDLY MADE WHILE IN CUSTODY BECAUSE THE DEFENDANT WAS NEVER READ HIS MIRANDA RIGHTS.
 - A. BERKEMER v. McCARTY MANDATES THAT CERTAIN STATEMENTS ALLEGEDLY MADE BY THE DEFENDANT AT THE POLICE STATION SHOULD BE SUPPRESSED BECAUSE THE DEFENDANT WAS NOT READ HIS MIRANDA RIGHTS.
 - B. THIS COURT MAY, AND SHOULD, HOLD BERKEMER TO BE RETRO-ACTIVE.
2. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE COURTS BELOW DID NOT EXCLUDE FROM EVIDENCE ON THE CHARGE OF DRIVING WHILE INTOXICATED THE FACT THAT DEFENDANT REFUSED TO SUBMIT TO THE BREATH TEST.

- A. INTRODUCTION OF THIS EVIDENCE OFFENDS THE RIGHT OF SELF-INCRIMINATION AS PROTECTED BY THE NEW JERSEY LAW.
- B. THE INTRODUCTION OF THIS EVIDENCE WITHOUT ADEQUATE WARNING OF ITS POTENTIAL USE AT TRIAL VIOLATES DUE PROCESS AS GUARANTEED BY THE NEW JERSEY CONSTITUTION.
- 3. THE TESTIMONY OF THE ARRESTING OFFICER IN MUNICIPAL COURT REVEALS THAT HE DID NOT HAVE ANY BASIS TO STOP THE DEFENDANT'S VEHICLE AND THEREFORE THE CHARGES AGAINST THE DEFENDANT SHOULD BE DISMISSED.
- 4. THIS COURT SHOULD FIND THAT THE STATE HAS FAILED TO UPHOLD ITS BURDEN OF PROVING THAT THE DEFENDANT DROVE WHILE INTOXICATED AND THIS COURT SHOULD REVERSE DEFENDANT'S CONVICTION.
- 5. IF THE COURT FINDS THE DEFENDANT GUILTY OF DRIVING WHILE INTOXICATED, THE DEFENDANT SHOULD BE SENTENCED AS A FIRST OFFENDER UNDER THE NEW DRUNK DRIVING STATUTES.

We have considered the contentions raised and the arguments advanced in support of them and find they are clearly without merit. R. 2:11-3(e) (2). Defendant's conviction for driving while

under the influence of alcohol is affirmed substantially for the reasons expressed by Judge Carridi in his letter opinion dated April 18, 1985. See State v. Johnson, 42 N.J. 146, 157-162 (1964). We add simply that defendant was properly sentenced as a third offender. The change in statute, N.J.S.A. 39:4-50, to make a .10% blood alcohol content a per se violation rather than a presumption of guilt does not render defendant a first offender. See State v. Phillips, 154 N.J. Super. 112 (Law Div. 1977), aff'd 169 N.J. Super. 112 (Law Div. 1977), aff'd 169 N.J. Super. 452 (App. Div. 1979). Affirmed.



SUPERIOR COURT OF NEW JERSEY

John J. Cariddi,
Judge

Bergen County
Court House
Hackensack, N.J.

Superior Court of New Jersey
Law Division - Bergen County
Appeal from Woodcliff Lakes
Municipal Court
Docket #84-8767

STATE OF NEW JERSEY

v.

CHARLES STEVER,

Defendant.

LETTER DECISION

Mr. Frank Spada
Bergen County Prosecutor's Office
Bergen County Court House
Hackensack, New Jersey 07601

Contant, Contant, Schuber, Scherby
& Atkins
Attorneys for Defendant
33 Hudson Street
Hackensack, New Jersey 07601

Gentlemen:

On January 5, 1984, the defendant,
Charles D. Stever, was arrested by
Patrolman Michael Origoni of the
Woodcliff Lakes Police Department and
charged with operating a motor vehicle
while under the influence of intoxicating



liquor. in violation of N.J.S.A. 39:4-50, refusing to submit to a breath test, in violation of N.J.S.A. 39:4-50.2 and drinking while driving in violation of N.J.S.A. 39:4-51(a). The defendant was tried before the Municipal Court of Woodcliff Lake on May 29, 1984. On that date the court rendered its verdict, finding the defendant guilty as charged.

For the drinking while driving offense (N.J.S.A. 39:4-51(a), the court imposed a fine of \$200.00 plus \$10.00 costs. For the refusal to take the breathalyzer test offense (N.J.S.A. 39:4-50.2), the court imposed a fine of \$250.00 plus \$10.00 and suspended the defendant's license for two years. For the drunk driving offense (N.J.S.A. 39:4-50), the court imposed a fine in the amount of \$1,000.00, \$10.00 costs, the defendant's driver's license was suspended for a period of ten years, and the defendant was to serve ninety days

community service and ninety days as an inpatient in an alcohol rehabilitation center.

On June 6, 1984, the defendant appealed only the D.W.I. conviction. The sentence for the D.W.I. conviction was stayed pending appeal.

This matter was heard before this Court on October 24, 1984. This Court remanded this matter to Municipal Court for additional testimony concerning alibi witnesses. More specifically, the Court remanded the case because the defendant had not been made aware through discovery that Officer Origoni had seen the defendant's car at Spanky's Bar. Officer Origoni's testimony that he had seen the defendant's car at Spanky's Bar had been used to refute the defendant's testimony that he had only gone to the bar called "Talk of the Town". Accordingly, this Court, pursuant to defendant's request, remanded the case so that the defendant would have an



opportunity to present evidence that he was never at Spanky's Bar. The Court believed that further testimony on this issue would help shed light on the credibility of the witnesses involved herein.

After testimony was heard on November 27, 1984, the Municipal Court Judge reaffirmed his findings on December 6, 1984. The case was henceforth appealed to this Court and is heard as a trial de novo on the record in accordance with R.2:23.8.

In noting that this is a trial de novo, I am instructed by State v. Johnson, 42 N.J. 146 (1964) to give due, although not controlling regard to the opportunity of the lower court to judge the credibility of the witnesses and their testimony.

Today the court must decide whether the defendant is guilty of violating N.J.S.A. 39:4-50. Under N.J.S.A. 39:4-50

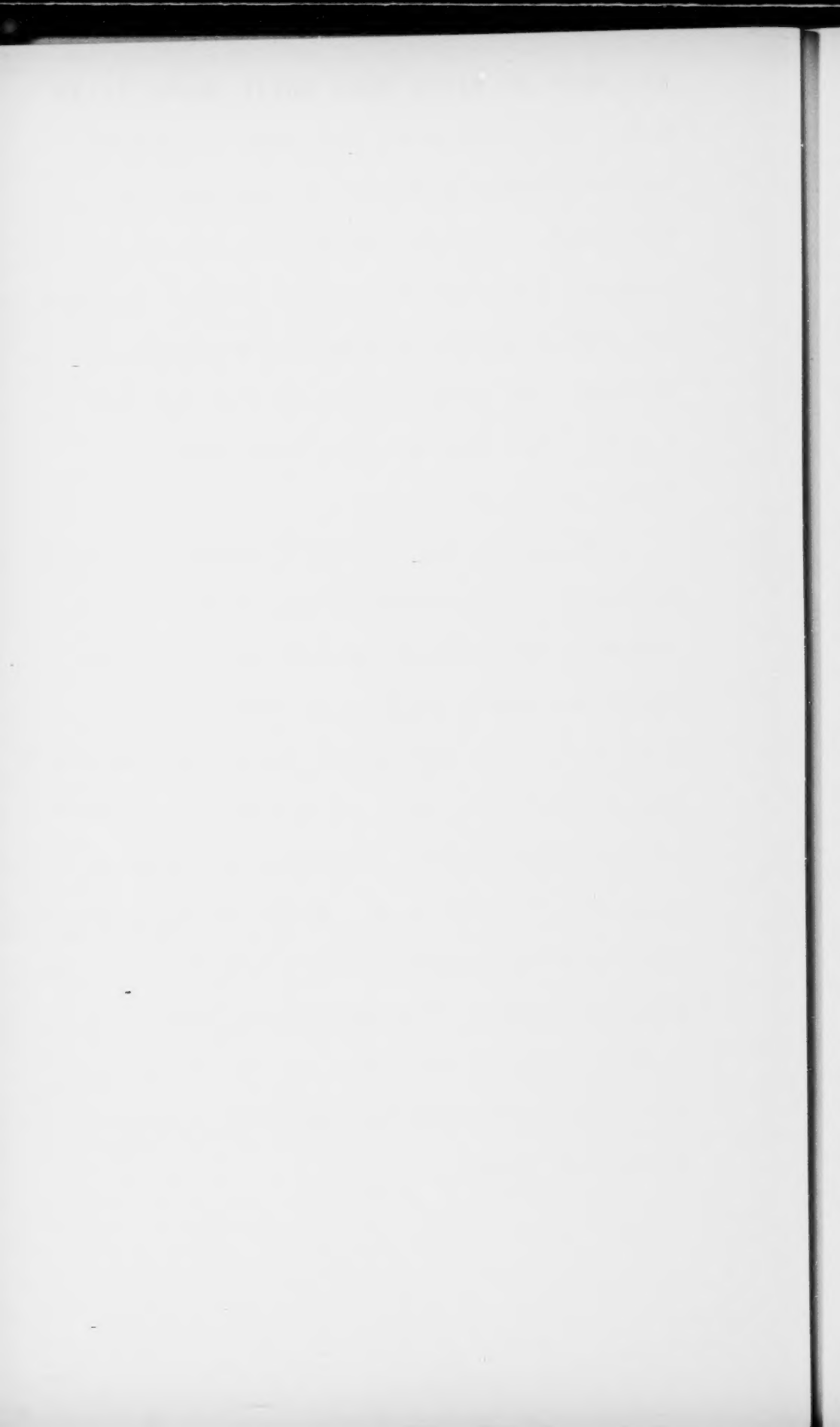


"[A] person who operates a motor vehicle while under the influence of [alcohol] . . . or operates a motor vehicle with a blood alcohol concentration of .10% or more by weight of alcohol in the [person's] blood." shall be subject to a mandatory statutory penalty. The defendant claims not to have violated this statutory provision. The court, in deciding whether the defendant has violated this provision sits as sole trier of both fact and law. Such a hearing involves a careful assessment by the Court of the credibility of the witnesses. After carefully assessing the testimony in case, as well as the law, the Court concludes that the State has proven each and every element of an N.J.S.A. 39:4-50 offense beyond a reasonable doubt.

On January 4th, the defendant claims to have worked from 7:00 a.m. to 7:30 p.m. at a construction site. After work, he says that he went to his home in Park Ridge for one hour and then to the

Ski Barn in River Edge until about 11:30 p.m., or 12:00 a.m. and then proceeded to his friend's place of business in Westwood. During the entire day of January 4th, the defendant claims to have not had a single alcoholic beverage. However, he admits that he did not eat dinner that day and his last meal was lunch at 12:00 noon.

While at his friend's store in Westwood (now January 5th), the defendant claims that he had two 12-ounce beers between 12:00 a.m. and 12:45 - 1:00 a.m. The defendant says that he and his friend then went to a bar called Talk of the Town. They allegedly arrived at this bar at 1:45 a.m. While at the bar, the defendant says that he had one Heineken beer. The defendant then claims that he left the bar at 2:45-3:00 a.m. and proceeded to Broadway Avenue in Woodcliff Lake.



On Broadway Avenue, the defendant was followed by Officer Origoni, who says that he observed the defendant's car to cross the center yellow line too times. He noticed the defendant to be going only 27.5 mph in a 35 mph zone. Consequently, Officer Origoni pulled the defendant's car over at about 3:05 a.m. and asked for the defendant's license, insurance and registration. The defendant, according to Officer Origoni, fumbled his way through his wallet and the car's glove compartment to obtain these items. The officer saw a half full bottle of Heineken beer in the center console next to the defendant. He also observed the defendant's face to be flush, his eyes to be bloodshot and watery, and his breath and the car's interior to be full of an odor of alcohol. Accordingly, he asked the defendant to get out of his car so that he could conduct an alcohol detection test. He asked the defendant to recite the alphabet. Officer Origoni

states that the defendant slurred when he said the letters and scrambled all of them about. The defendant, on the other hand, says that he got through the letter "S" and then made a mistake. The defendant thereafter was given the heel-to-toe-straight-line walking test. Officer Origoni says that the defendant swayed in two attempts and walked in a random fashion. The defendant, however, states that he did the test properly. Officer Origoni then gave the defendant the finger-nose test. The officer states that the defendant also failed this test. He says that the defendant did not extend his arms as he had been instructed to do and also had touched the bridge of his nose rather than the tip of his nose. The defendant, of course, says that he did this test properly. Upon the defendant's failure of the finger-nose test, Officer Origoni arrested him for drunk driving. The defendant was then brought to the station house at about 3:15 a.m.

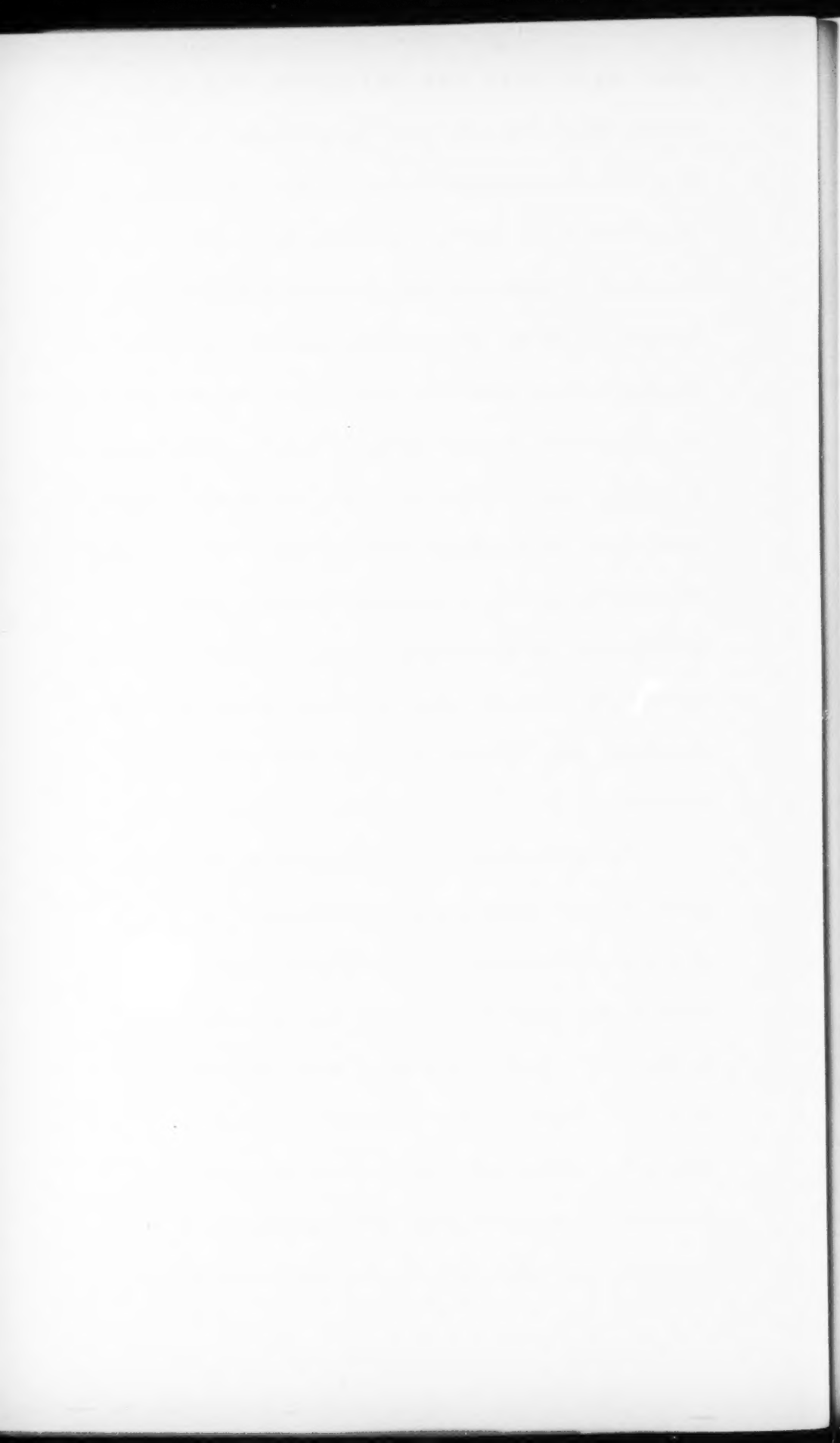


At the station, the defendant was read the breathalyzer form three times. The defendant, however, refused to take the test. According to Officer Origoni, the defendant said that he didn't want to "F**" himself by taking the test. The defendant, however says that he said that he would be "f**" if the maching was not properly working. In any event, he refused to take the test.

Upon making the arrest, Officer Origoni was accompanied by Officer Arrone. Officer Arrone came to the scene a few minutes after the defendant was stopped. He testified that the defendant failed the tests given to him by Officer Origoni. Officer Arrone described the defendant's failure of these tests in the same manner in which Officer Origoni did. He says that the defendant said the alphabet in a "random" fashion and performed the heel-to-toe walking test in a "random fashion". He

also says that the defendant did not touch the tip of his nose when he took the touching-nose test. All of these observations were made by Officer Origoni. Furthermore, like Officer Origoni, Officer Arrone heard the defendant say that he would be "F**" if he took the breathalyzer test. Officer Arrone, also like Officer Origoni, says that the defendant had an odor of alcohol on his breath, a flushed face, and bloodshot and watery eyes. Lastly, both officers are of the opinion that the defendant was drunk on the night in question.

As the foregoing evidence reveals, there is an overwhelming amount of evidence tending to indicate that the defendant was under the influence of alcohol. Both officers saw the defendant fail three alcohol-detection tests. Both officers saw the defendant's mannerisms and appearance to be that of one under the influence of



alcohol (swaying in movements, slurred speech, flushed face, bloodshot watery eyes, odor of alcohol on breath). And both officers were there when the defendant refused to take the breathalyzer test. Furthermore, Officer Origoni saw the defendant drive in an erratic fashion and saw the half full bottle of Heineken beer next to the defendant in his car. And finally, the defendant admitted to drinking a few beers while on an empty stomach.

The defendant, however, claims that he should not be found guilty of drunk driving for the following reasons:

(1) Because the defendant was never read his Miranda rights, his statement allegedly made while in custody should be suppressed.

(2) This Court should exclude from evidence on the charge of drunk driving, the fact that the defendant refused to submit to the breath test. The defendant claims his rights



against self-incrimination and due and due process prohibit such refusal to be used against him.

(3) The officers' testimonies are "hopelessly inconsistent" on key issues, thereby causing the State to fail to meet its beyond a reasonable doubt burden.

(4) The officer's testimony in Municipal Court reveals that he did not have any basis to stop the defendant's vehicle and therefore the charges against the defendant should be dropped as fruit of the poisonous tree.

The Court shall discuss each of these arguments in turn:

(A) MIRANDA VIOLATION.

Upon the recent Appellate case of State v. Adams, slip opinion decided April 10, 1985, the defendant's statements made to the police are admissible against him. Adams held that Berkimer v. McCarty, 82 L.Ed. 2d 317 (1984)

(which held that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards established in Miranda v. Arizona, 384 U.S. 436 (1966) regardless of the nature or severity of the offense which occasioned the arrest) was not retroactive and "that only those defendants whose constitutional rights were violated after the date of Berkimer can have the benefit of the new rule. "Adams, slip opinion page 8. Here, the incident was prior to Berkimer and therefore the defendant was not entitled to have his Miranda right read to him. Thus, the defendant's statements made before and after arrest are admissible against him. In particular, his statement to Officers Origoni and Arrone that he didn't want to "F**" himself by taking the test is admissible. Likewise, the defendant's statements that he would not take the breathalyzer test and that he had 3 or 4 beers are admissible.



Furthermore, any other statements made by the defendant that night are admissible. The Court of course recognizes that if coercion was used by the police such statements would be inadmissible. However, the Court fails to find any coercion under the circumstances of this case.

(B) REFUSAL TO TAKE BREATHALYZER TEST AS EVIDENCE.

The defendant's argument that his refusal to take the breathalyzer test should be inadmissible as evidence because it offends his self-incrimination and due process rights has no merit. We have already discussed how the defendant was not entitled to Miranda-Berkimer rights. See Section (A), supra. Concomitantly, under State v. Tabicz, 129 N.J. Super. 80 (App. Div. 1974), the failure of an accused to submit to the breathalyzer test is admissible as evidence to infer a violation of N.J.S.A. 39:4-50. Furthermore, the U.S. Supreme



Court in South Dakota v. Nelville, 74 L. Ed. 2d 748 (1983) held that the admission into evidence of a defendant's refusal to submit to a breathalyzer test does not offend the right against self-incrimination. The Court also held therein that it was not a due process violation for the State to use the refusal to take the test as evidence of guilt, even though the defendant was not specifically warned that his refusal could be used against him at trial. Thus, the defendant herein cannot claim that his self-incrimination and due process rights will be violated by the admission of his refusal to take the breathalyzer test.

(C) CONSISTENCY/CREDIBILITY.

The two preceding issues are not the controlling factors in this case. Rather, the key to this case is credibility; that is, which version of the testimony is more believable, that of the officers or that of the defendant.



Pursuant to the defendant's request, this Court specifically remanded the case so that the defendant could have an opportunity to present evidence concerning his not being at Spanky's Bar. The Court agreed with the defendant that this would help shed light on the credibility of the parties in this case.

After a careful review of the remanded transcript as well as the original transcript, this Court finds that the officers' testimony is more credible.

In evaluating credibility, inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the court to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection like failure of recollection, is not an uncommon experience. The court in weighing the



effect of a discrepancy or an inconsistency must consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood.

In the present case, the Court finds the defendant to have made willful misrepresentations as to matters of substantial importance. On the other hand, the Court finds the inconsistencies of the officers' testimony to be nonwillful and primarily pertaining to peripheral matters.

The defendant claims that the officers' testimony is hopelessly inconsistent. This assertion is far from the truth. The defendant says that the officers were describing "entirely different individuals". However, as indicated in the statement of facts, the officers were consistent as to how the defendant failed the alcohol-detection



tests, how the defendant's mannerism and appearance were and how the defendant refused to take the breathalyzer test. The defendant says that one officer described him to be a bit boisterous while the other officer said he was calm and speaking in whispers. This contrast in testimony is insignificant considering the numerous consistencies of the officers' testimony and considering that the officers were perhaps describing different moments of this occurrence.

The defendant, however, does point out one significant inconsistency in Officer Origoni's testimony. Officer Origoni first testified that it was a cold clear night when he made the arrest and the upon cross-examination admitted that this statement was wrong because his report indicated that it was a wet foggy night. Nevertheless, such an inconsistency cannot be said to be so significant as to refute all of the other inconsistencies.



The defendant also argues that the officers' testimony as to his being at Spanky's Bar is a significant inconsistency. The Court believed that this was a significant concern. Thus, this Court remanded the matter for further testimony. Rather than exculpate the defendant, the Court finds that the defendant's alibi witnesses inculpated him. Firstly, all of them -- Louis Vingillio, Joseph Sladger and Robert McGarry -- testified that the defendant was drinking Heineken beer that night. Mr. Virgillio and Mr. Sladger testified that the defendant had about two beers. These two witnesses also testified, as did Mr. Stever, that from about 12:00 or 1:00 a.m., the defendant was at the ski shop. However, these two did not know where the defendant was after 1:00 a.m. as they had left the ski shop at such time. Thus, they could not say that at 1:05 a.m. the defendant was not at Spanky's Bar.



Mr. McGarry also could not testify absolutely as to where the defendant was from the time he left the ski shop to the time he got to Talk of the Town; for he said that he and the defendant left at 1:00 a.m. to go to Talk of the Town but he indicated that they drove in different cars.

Further, Mr. Garry testified that he and the defendant had another beer when at Talk of the Town. However, he indicated that he "wasn't really counting" the numbers of beers the defendant had.

Thus, the testimony of the second Municipal proceeding does indicate that the defendant was drinking on the night in question. Perhaps, it also indicates that Officer Origoni was mistaken as to seeing the defendant's car at Spanky's Bar. However, this potential discrepancy does not detract from the real issue before the Court, namely, whether the defendant was driving under the influence of alcohol.



The Court finds that the testimony of the defendant and his witnesses is much more questionable. The defendant testified in the first Municipal Court proceeding that the open Heineken beer which was found next to him in the car was put there a few days earlier by him. It was, so he says, just garbage littering up the car. This explanation is ludicrous, especially in light of the fact that we now know the defendant had been drinking Heineken beer that entire night. It is also ludicrous in light of the fact that the defendant said his wife had driven the car with the beer sitting in the console next to her. Furthermore, the alibi witnesses seem to be deliberately vague as to the number of beers consumed by the defendant. Mr. McGarry testified that "he wasn't really counting" the number of beers the defendant had at the Talk of the Town. Likewise, Mr. Vingillio and Mr. Sladger testified that the defendant had "a few

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beers", perhaps two in all.

In sum, the evidence clearly points to the defendant to have driven under the influence of alcohol. At a minimum, from the testimony of the defendant and his witnesses, the defendant had three Heineken beers while on an empty stomach. Add these facts to the officers' testimony and the defendant's refusal to take the breathalyzer test, and there can only be one conclusion: the defendant was intoxicated when he drove that night.

In State v. Higgins, 132 N.J. Super 67 (1975), the Court pointed to such facts as the defendant therein driving erratically, as having blood-shot eyes and an odor of alcohol on his breath, as having admitted to having a few beers, and as swaying in his walk, to conclude such defendant to be under the influence. Here, the defendant did drive erratically, did admit to having a few beers, did sway



in his walk, did have bloodshot eyes and a flushed face and did have an odor of alcohol on his breath. Furthermore, the officers testified that the defendant failed three alcohol detection tests. Consequently, the Court finds the defendant to have exhibited those characteristics of one under the influence of alcohol. Therefore, the Court finds the defendant guilty of an N.J.S.A.39:4-50 violation without any consideration of the breathalyzer test.

The Court adds that in making this decision it has used the statements made by the defendant, namely that he said "he would f** himself if he took the breathalyzer test" and that he told the officers he had three or four beers. The Court also adds that the defendant's refusal to take the breathalyzer test was a factor used in finding the defendant to be guilty of the offense. Such a factor is permissible under Tabicz, supra.



Lastly. the Court notes that the defendant's argument that the officer under Delaware v. Prouse had no reasonable suspicion to stop the defendant's vehicle is without merit. The defendant's car was seen crossing the center line two times. Such driving would give an officer a reasonable suspicion that the driver might be under the influence. Therefore, the defendant's vehicle was lawfully stopped and there was no fruit from a poisonous tree.

One other note. In court, the defendant stated that the lack of a sequestration order injured his interests. The Court rejects this contention. The defendant had the opportunity to ask the lower court for a sequestration of witnesses but did not. Furthermore, the defendant had the same advantages and disadvantages that the prosecutor had from lack of the sequestration order. He has no

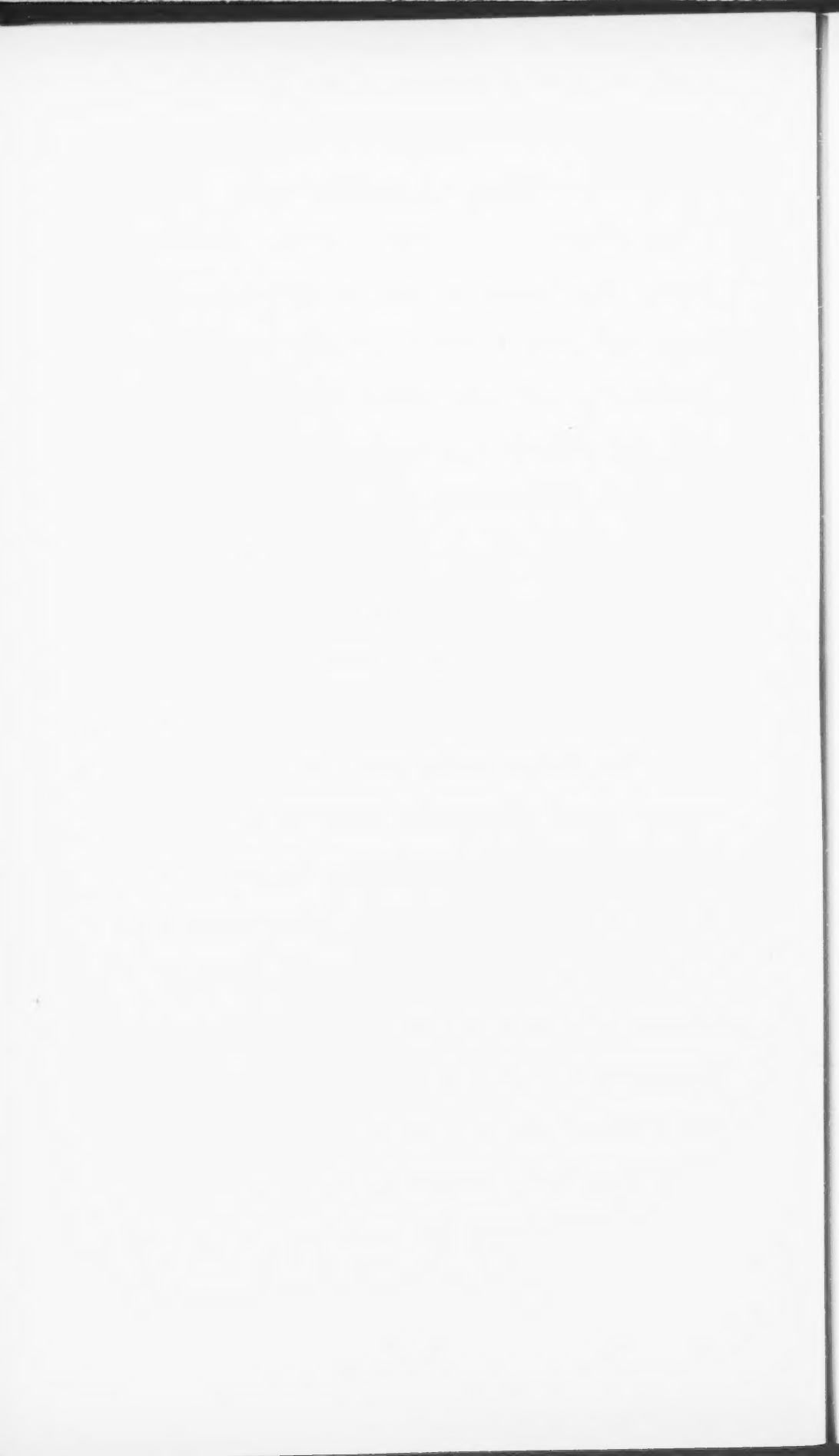
right now to allege that his rights were prejudiced by lack of such order.

For the foregoing reasons, the Court finds the defendant to have violated N.J.S.A. 39:4-50. The Court must now address whether the defendant should be sentenced as a third offender. The defendant contends that it would be fundamentally unfair and a violation of due process for him to be convicted as a third offender because his two previous convictions occurred under the prior D.W.I. statutes as amended in 1977 for the second offense and as amended in 1971 for the first offense. The Court rejects this contention.

The amended statute for 1983 (effective April 7, 1983 through October 5, 1984) which the defendant is convicted of violating, confronts the same evil of the prior statute, namely, the operation of a motor vehicle by one who is in such a condition that it may effect the safety of others as well as

that of the operator. See State v. Phillips, 154 N.J. Super. 112, 117 (1977) and State v. Culbertson, 156 N. J. Super. 167, 170 (1978). Furthermore, the legislature in 1983's amendment did not state that the prior statutory offense would be included under the amended provision. From such silence, the Court can infer that the legislature intended to include offenses of the prior statute as being included as offenses under this amended provision.

The Court adds that it fails to accept that this case should be distinguished from Phillips, supra. In Phillips, the defendants were convicted of "driving under influence" in violation of 1977 amended statute. The defendants also had convictions under the 1971 statute. However, a person under the 1971 statute could be convicted of either (a) driving while under



the influence of (b) driving while impaired. The defendants had been found guilty of driving while impaired. Thus they argued that they should not be considered subsequent offenders under the 1977 amendment since the new statute only used the term "driving while under the influence." The Court rejected this argument and held that the impaired standard of the 1971 provision was included in the Driving While Under the Influence standard of the 1977 provision. The court reasoned:

"Where the elements of an offense under an amended statute are the same as those that existed prior to the amendments; where both statutes continue to address the same unlawful conduct, and where the legislative policies and intentions remain substantially unchanged. . . it would be incongruous to hold that the legislature intended to preclude the invocation of the subsequent offender provisions where the defendant was convicted of an offense under the original statute and is later convicted under the amended law. This is especially true where the amendments do not result in a change in the elements or nature of the offense but merely reflect a modification in manner and method of sentencing." [Id. 119]



This reasoning is equally applicable to the present case. The elements and nature of the offense remain the same, namely -- one must not "drive while under the influence." Two, the same unlawful conduct is addressed, namely -- driving while under the influence. Thus, the legislature policy remains the same, namely -- keeping drunk drivers off the road.

Furthermore, the amended statute does not violate ex post facto provisions of the Federal and State Constitutions. "Subsequent offender provisions, such as the one in effect here, do not undertake to punish again for the prior offenses. The prior offense merely provides a background to be considered in sentencing for a subsequent offense." Id. p. 119.

Thus, the Court shall hold the defendant to be a third time offender under the act. The Court imposes a fine in the amount of \$1,000.00, \$10.00 costs, the defendant's driver's license



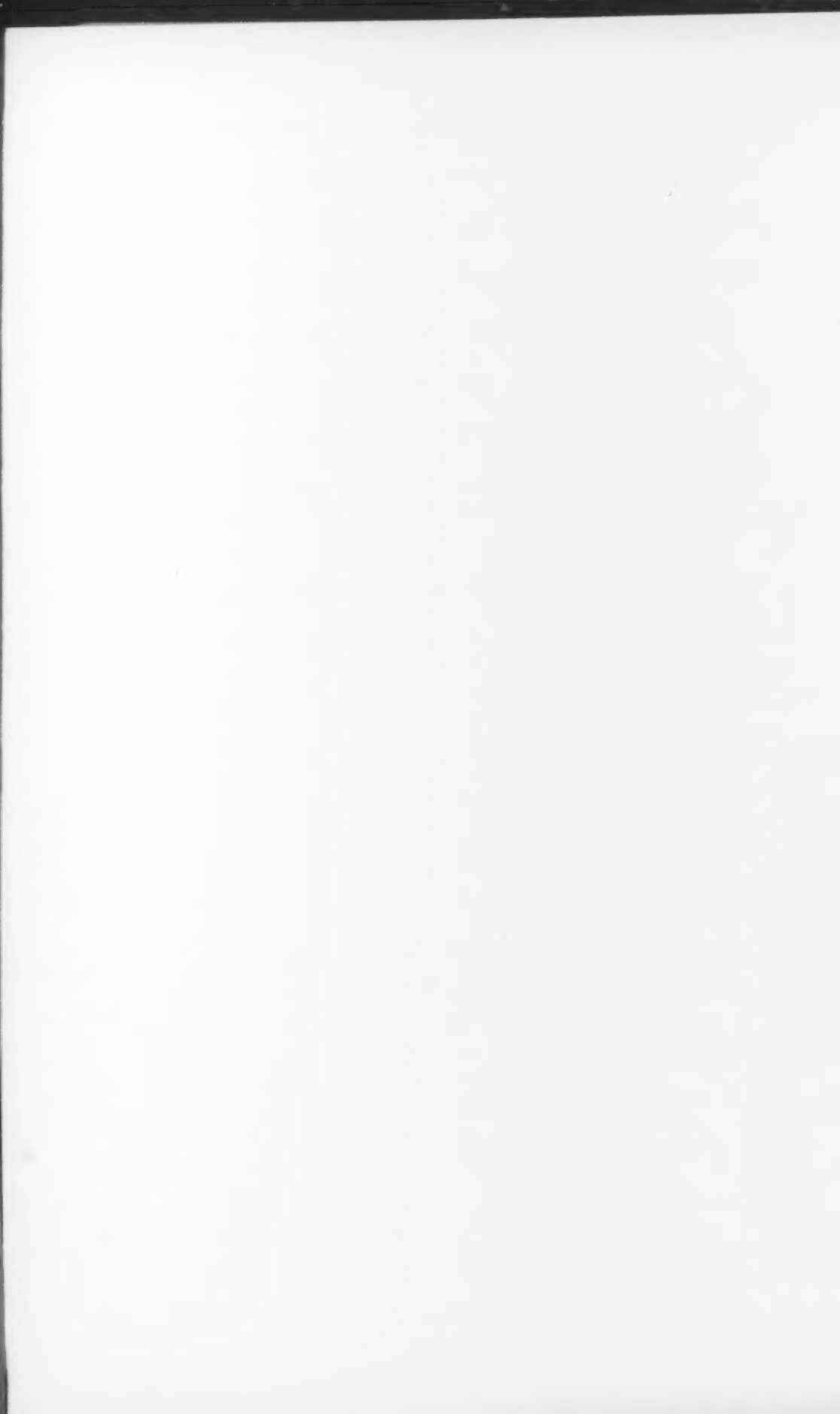
is suspended for a period of ten (10) years, and the defendant is to serve ninety (90) days community service and ninety (90) days as an inpatient in an alcohol rehabilitation center.

The Assistant Prosecutor is to please submit an appropriate Order in conformity with this decision.

Very truly yours,

John J. Cariddi, J.S.C.

JJC/ml



LARRY J. McCLURE
BERGEN COUNTY PROSECUTOR
BERGEN COUNTY COURTHOUSE
HACKENSACK, NEW JERSEY 07601

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
APPEAL FROM WOODCLIFF LAKE
MUNICIPAL COURT
DOCKET #84-8767

STATE OF NEW JERSEY

CRIMINAL ACTION

Plaintiff,

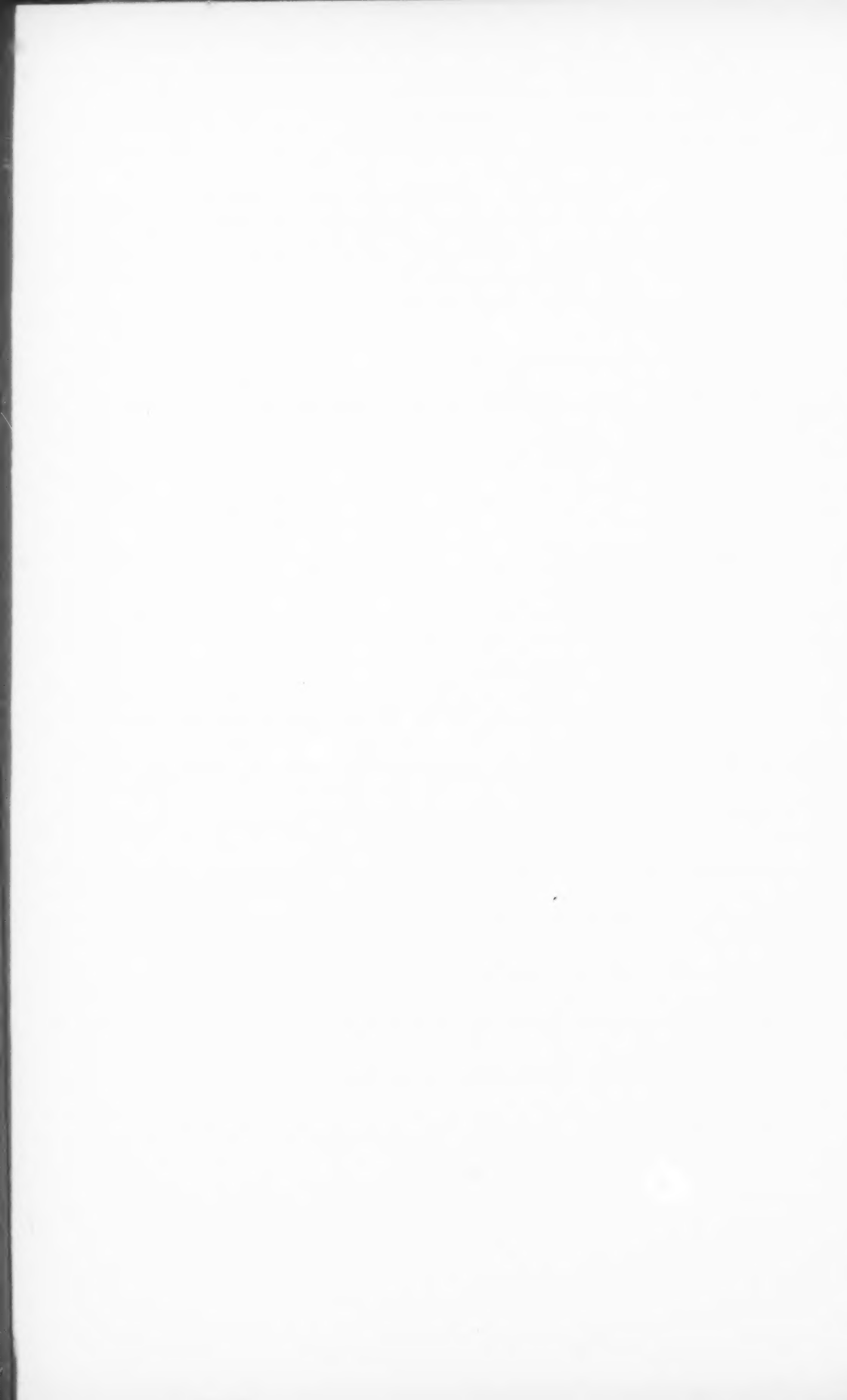
vs.

ORDER

CHARLES STEVER,

Defendant.

This matter having been presented to the Court by Frank X. Spada, Law Clerk, Bergen County Prosecutor's Office, appearing on behalf of the State, and Bruce L. Atkins, Esq., appearing on behalf of the defendant, CHARLES STEVER, and the court having considered the arguments of counsel, and having found the defendant guilty of N.J.S.A. 39:4-50



IT IS on this 29th day of May, 1985

ORDERED that the defendant shall pay
a fine of \$1,000.00.

IT IS FURTHER ORDERED THAT the
defendant shall pay \$10.00 court costs.

IT IS FURTHER ORDERED that the de-
fendant's drivers license shall be sus-
pended for a period of ten (10) years.

IT IS FURTHER ORDERED that defendant
is to perform ninety (90) days of
community service.

IT IS FURTHER ORDERED that de-
fendant shall undergo in-patient therapy
in an alcoholic rehabilitation center
for ninety (90) days.

S/ John J. Cariddi
HON. JOHN J. CARIDDI, J.S.C.